Preserving the Core of *Roe:* Reflections on *Planned Parenthood v. Casey*

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ABSTRACT. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court backed away from affording women the highest level of constitutional protection for the abortion choice, but nonetheless promised to preserve *Roe v. Wade*'s core objectives by instituting the undue burden standard for measuring the constitutionality of restrictions on abortion. In the years following the *Casey* decision, states and the federal government have added more and more restrictions on women's access to abortion. This Article asks whether *Casey*'s undue burden standard has meaningfully protected a woman's right to an abortion.

The Article begins by describing the undue burden standard's development and application, from pre-*Casey* decisions to the *Casey* joint opinion. Part III describes the Supreme Court's clarification and application of the standard in its subsequent abortion decisions. Part IV reviews the ways in which lower courts have implemented the undue burden standard, concluding that, if correctly and fairly applied, the *Casey* standard can provide meaningful

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protection for the abortion right. The Article ends with recommendations for solidifying and clarifying the undue burden standard, which will ensure that *Roe*'s core is preserved as promised in *Casey*.

I. INTRODUCTION

Nearly fifteen years have passed since the United States Supreme Court's historic decision in *Planned Parenthood v. Casey*.[1] As litigators for Planned Parenthood of Southeastern Pennsylvania and other Pennsylvania reproductive health care providers in the *Casey* litigation, we had awaited the day of the decision with foreboding. Fully prepared for a wholesale overruling of *Roe v. Wade* that would sanction the recriminalization of abortion, instead we greeted the *Casey* decision with a mixture of surprise, relief, and uncertainty.

While the Supreme Court discarded the highly protective strict scrutiny standard of *Roe*,[2] the *Casey* joint opinion nevertheless preserved the core of *Roe* by adopting the undue burden test to measure the constitutionality of restrictions on abortion.[3] This new standard was arduous enough to sustain a facial challenge to two of the restrictive provisions challenged in *Casey*—the Pennsylvania law's husband-notification requirement[4] and its related reporting provision[5]—and to raise concerns about the constitutionality of others, despite the limited record before the Court.[6] That this new standard was meant to offer meaningful protection for women is further supported by the joint opinion's passionate discussion of the benefits that reproductive liberty had bestowed upon generations of women and their prospects for full equality.[7]

As with any new test, however, the undue burden standard would have to be applied in subsequent cases before its full contours became clear. In the years following the *Casey* decision, state legislatures, as well as the federal government, have added more restrictions on women's access to abortion.[8] These laws, now subject to review under the *Casey* standard, include mandatory waiting periods,[9] informed consent scripts that force doctors to give

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1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

2. Roe v. Wade, 410 U.S. 113 (1973).

3. *See, e.g.*, *Casey*, 505 U.S. at 879 ("Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade* and we reaffirm that holding."). The lead opinion in *Casey* was a rare joint opinion coauthored by Justices O'Connor, Kennedy, and Souter. Justices Blackmun and Stevens joined in those parts of the opinion that reaffirmed *Roe*'s essential tenets and invalidated the husband-notification provision of the Pennsylvania law and its related reporting requirement. *See generally infra* Part II.B (discussing the *Casey* joint opinion's reaffirmation of *Roe*).

4. *Casey*, 505 U.S. at 887-98.

5. *Id.* at 901.

6. *See generally infra* Part II.C (discussing the *Casey* joint opinion's application of the undue burden standard to the challenged provisions of the Pennsylvania law).

7. *See infra* note 67 and accompanying text.

8. According to the Alan Guttmacher Institute, between 1992 and 2005, states enacted 299 laws restricting abortion. Memorandum from Elizabeth Nash, Pub. Policy Assoc., Alan Guttmacher Inst. (Apr. 26, 2006) (on file with the authors). In contrast, between 1985 and 1991, states enacted only sixty-eight abortion restrictions. *Id.*

9. Mandatory waiting periods have proliferated across the United States in the years following *Casey*. Although these laws were on the books in approximately thirteen states prior to *Casey*, they were not being enforced because they had been ruled constitutionally invalid in 1983. *See* Terry Sollom, *State*

their patients information biased against abortion,[10] onerous licensing and regulatory schemes for abortion providers,[11] detailed reporting requirements,[12] consent and notification requirements for minors,[13] abortion procedure bans,[14] and laws making abortion providers strictly liable for any and all damage to their clients.[15] In the first four months of 2006 alone, legislators in fourteen

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Legislation on Reproductive Health in 1992: What Was Proposed and Enacted, 25 FAM. PLAN. PERSP., Mar.-Apr. 1993, at 87, 88. At the end of 1992, only two states enforced mandatory waiting periods, but forty-one counseling or waiting period bills were introduced in twenty-four states. *Id.* By August 1994, fifteen states had laws imposing waiting periods and seven states were enforcing them. *See* Frances A. Althaus & Stanley K. Henshaw, *The Effects of Mandatory Delay Laws on Abortion Patients and Providers*, 26 FAM. PLAN. PERSP., Sept.-Oct. 1993, at 228, 228. Twenty-four states now require women to listen to state-prescribed information and then wait for a specified period of time, usually twenty-four hours, before the abortion procedure is performed. GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS 1 (2006), *available at* http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. In six of these states, the laws require that the state-mandated information always be provided to women in person, thereby necessitating two visits to the abortion provider. *Id.*

10. Twenty-eight states require women to receive state-prescribed counseling biased against abortion before an abortion procedure. *Id.* As part of the counseling, three of these states force providers to tell women about the purported link between abortion and breast cancer; four states require information on the fetus's purported ability to feel pain; and three states require that women be warned about the possible long-term mental health consequences of having an abortion. *Id.* These laws are consistent with a concerted strategy on the part of abortion opponents to cast abortion as harmful to women, and to cast abortion restrictions as "pro-woman" legislation necessary to protect women's health. *See generally* DAVID C. REARDON, MAKING ABORTION RARE (1996) (arguing for a comprehensive "pro-woman/pro-life" initiative, including legislation, public education, and research, that focuses on the purported harmful effects of abortion on women).

11. Thirty-three states have laws burdening abortion providers with restrictions not applied to other comparable medical providers. NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES: TARGETED REGULATION OF ABORTION PROVIDERS (TRAP), http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/nationwide-trends/issues-trap.html (last visited Oct. 16, 2006). These laws, referred to by opponents as TRAP (Targeted Regulation of Abortion Providers) laws, commonly require doctors to acquire licenses and restrict abortion services to hospitals or specialized facilities. *Id.*

12. Forty-six states require abortion providers to submit regular and confidential reports to the state. GUTTMACHER INST., STATE ABORTION POLICIES IN BRIEF: ABORTION REPORTING REQUIREMENTS 1 (2006), http://www.guttmacher.org/statecenter/spibs/spib_ARR.pdf. Three states and the District of Columbia collect this information on a voluntary basis. *Id.*

13. Forty-three states have enacted laws that require parental involvement if a minor decides to have an abortion; in nine of those states, enforcement is enjoined because of constitutional defects in the laws. *See* GUTTMACHER INST., STATE ABORTION POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS' ABORTIONS 2 (2006), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

14. Thirty-one states have enacted criminal prohibitions against an array of abortion procedures commonly used in the second-trimester of pregnancy, often mislabeled by the bills' proponents as "partial-birth" abortions. *See* Ctr. for Reprod. Rights, *Briefing Paper: So-Called "Partial-Birth Abortion" Ban Legislation, By State* (Feb. 2004), *available at* http://www.reproductiverights.org/pdf/pub_bp_pba_bystate.pdf [hereinafter Ctr. for Reprod. Rights, *Briefing Paper*].

15. *See, e.g.*, LA. REV. STAT. ANN. § 9:2800.12 (2006) (imposing civil liability on abortion providers for any injury to the woman or fetus, and making certain laws governing medical malpractice, including limitations of liability, inapplicable). *See generally* Jennifer L. Achilles, Comment, *Using Tort Law to Circumvent* Roe v. Wade *and Other Pesky Due Process Decisions: An Examination of Louisiana's Act 825*, 78 TUL. L. REV. 853 (2004) (analyzing the Louisiana law imposing tort liability on abortion providers); A.J. Stone III, Comment, *Consti-tortion: Tort Law as an End-Run Around Abortion Rights After* Planned Parenthood v. Casey, 8 AM. U. J. GENDER SOC. POL'Y & L. 471, 474 (2000) (examining the impact of abortion tort liability laws on women's right to abortion).

states proposed measures to ban virtually all abortion procedures,[16] and the South Dakota legislature passed, but voters rejected, the nation's first post-*Casey* abortion ban.[17] As governmental restrictions have mounted, the number of abortion providers in the United States has continued to decline.[18] Three states—North Dakota, Mississippi, and South Dakota—now have only one abortion provider in the entire state.[19] In these and many other states, women must travel long distances to reach a provider.[20]

With the highly visible confirmation hearings of Chief Justice Roberts and Justice Alito still fresh in the nation's memory and the federal Abortion Procedure Ban[21] undergoing Supreme Court review,[22] much media attention is fixated on whether the newly constituted Court will overrule *Roe*.[23] Some

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16. E-mail from Elizabeth Nash to authors (Oct. 3, 2006) (on file with the authors); *see* GUTTMACHER INST., MONTHLY STATE UPDATE: MAJOR DEVELOPMENTS IN 2006, http://www.guttmacher.org/statecenter/updates/index.html#bans (last visited Oct. 17, 2006).

17. 2006 S.D. Sess. Laws ch.119, H.B. 1215, 81st Leg. Assem., Reg. Sess. (S.D. 2006) (imposing criminal ban on abortions except when necessary to preserve the woman's life). The South Dakota bill was signed into law by Governor Mike Rounds in March 2006 and was scheduled to take effect on July 1, 2006, but a successful petition drive halted its implementation and secured a statewide vote on its validity. Gretchen Ruethling, *South Dakota: Certification for Abortion Plan Vote*, N.Y. TIMES, June 20, 2006, at A15. On November 7, 2006, a majority of voters in South Dakota rejected the ban. Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P1. On June 17, 2006, Louisiana Governor Kathleen Blanco signed into law a criminal ban on all abortions except those necessary to save the pregnant woman's life. 2006 La. Acts 467. Unlike South Dakota's abortion ban, the Louisiana law becomes effective upon the reversal of *Roe v. Wade* by the United States Supreme Court or the adoption of a federal constitutional amendment allowing bans on abortion. *Id.*

18. The number of abortion providers in the United States declined from 2380 providers in 1992 to 1819 providers in 2000, a twenty-four percent decrease. Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 10 (2003). During the same period, the number of abortions reported in the United States also declined, but at a substantially lower rate than the decline in the number of providers. *Id.* at 9 (noting that the number of reported abortions in the United States declined fifteen percent between 1992 and 2000, from 1,528,930 to 1,312,990).

19. Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws and Stigma*, WASH. POST, Dec. 27, 2005, at A01.

20. *See* Finer & Henshaw, *supra* note 18, at 10-11 (noting that in 2000, 87% of the counties in the United States had no abortion provider; "94% of all providers and 99% of those who performed 400 or more abortions" are located in metropolitan areas); *see also* Nieves, *supra* note 19 (noting that some women in South Dakota must travel 350 miles each way to the sole provider in the state: "For some women, the only way to do it—and not pay for a hotel room—is to make the 700-mile trip in one day").

21. *See* Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

22. Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (2006) (No. 05-1382) (invalidating the federal Abortion Procedure Ban on grounds that it lacks a health exception, imposes an undue burden, and is unconstitutionally vague); Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005) (striking down the same statute because it does not provide an exception for circumstances in which the procedure is necessary to protect the health of women seeking abortions), *cert. granted*, 126 S. Ct. 1314 (2006) (No. 05-380); *see also* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006) (holding that the statute violates due process rights of physicians and patients because it lacks a health exception).

23. *See, e.g.*, Stephen Henderson & James Kuhnhenn, *Alito Holds His Ground on 'Roe,'* PHILA. INQUIRER, Jan. 12, 2006, at A1 (describing the efforts of Democratic senators to press Samuel A. Alito to clarify his position on whether *Roe v. Wade* is settled law); Charles Lane, *Nominee's Reasoning Points to a Likely Vote Against* Roe v. Wade, WASH. POST, Nov. 2, 2005, at A6 (concluding that supporters and skeptics believe that Samuel A. Alito "would probably vote to strike down *Roe*"); Shannon McCaffrey, *Roberts Faces Test on Abortion*, PHILA. INQUIRER, July 22, 2005, at A1 ("Abortion

commentators suggest an alternative scenario, in which the Court will instead "incremental[ly] eviscerat[e]" *Roe* by applying the *Casey* undue burden standard to permit so many restrictions on the abortion right that soon only a privileged few will be able to exercise it.[24] Yet the *Casey* plurality's broad articulation of the standard, its application of the standard to the challenged provisions, and the expansive rhetoric of women's equality in which it couched the joint opinion all support the notion that the *Casey* Court indeed intended to preserve the core of *Roe* and not merely an empty shell.

Has the undue burden standard meaningfully protected a woman's right to an abortion? This Article analyzes the application of the *Casey* standard nationwide over the past decade-and-a-half to assess the current status of the constitutional protection it offers. Part II describes the development and application of the undue burden standard in the *Casey* litigation, focusing on the evolution of the standard from its narrow articulation in pre-*Casey* decisions and the court of appeals' opinion in *Casey* to its broader definition in the *Casey* plurality opinion. Part III describes the Supreme Court's clarification and application of the standard in its subsequent abortion decisions: *Mazurek v. Armstrong*,[25] *Stenberg v. Carhart*,[26] and *Ayotte v. Planned Parenthood*.[27] Part IV reviews the ways in which lower courts have implemented the undue burden standard in a variety of contexts, including challenges to mandatory waiting periods, state-scripted counseling provisions, licensing and regulatory schemes for abortion facilities, and bans on certain types of abortion procedures. This Part examines lower courts' contrasting approaches to applying the *Casey* standard to assess whether a given restriction has "the effect of placing a substantial obstacle in the path of a woman's choice . . . ."[28] The Article ends with recommendations for solidifying and clarifying the undue burden standard so as to ensure *Roe*'s core is preserved as promised in *Casey*. Application of *Casey* by some lower courts demonstrates that, if correctly and fairly applied, the undue burden standard can provide meaningful protection for the abortion right. While the Roberts Court could discard *Casey* altogether, if it keeps the undue burden test in place, the Article concludes that the Court must provide

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was emerging as the pivotal issue of Supreme Court nominee John G. Roberts Jr.'s confirmation battle as lawmakers and advocates on both sides of the aisle tried to read between the lines yesterday to determine whether he would work to overturn *Roe v. Wade*.").

24. Dawn Johnsen, *The Outer Shell: The Hollowing Out of* Roe v. Wade, SLATE, Jan. 25, 2006, http://www.slate.com/id/2134849; *see, e.g.*, Larry Eichel, *The Staying Power of* 'Roe v. Wade,' PHILA. INQUIRER, July 31, 2005, at C3 ("'I can't imagine *Roe* ever being explicitly overruled, although I can see it being narrowed to the point that it has no teeth in it.'") (quoting Professor Marci A. Hamilton), *available at* http://www.philly.com/mld/inquirer/news/special_packages/sunday_review/12264941.htm; Robin Toner & Adam Liptak, *In New Court,* Roe *May Stand, So Foes Look to Limit Its Scope*, N.Y. TIMES, July 10, 2005, at A1 ("[E]ven without overturning *Roe*, the new court could seriously limit the decision's reach and change the way abortions are regulated around the country, experts say.").

25. 520 U.S. 968 (1997).

26. 530 U.S. 914 (2000).

27. 126 S. Ct. 961 (2006).

28. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

the guidance that lower courts and litigants need to ensure that the standard offers meaningful protection to women.

II. THE MEANING OF THE UNDUE BURDEN STANDARD: ITS EVOLUTION IN *CASEY*

Prior to the *Casey* decision in 1992, "undue burden" terminology had appeared in some of the Supreme Court's abortion opinions,[29] and Justice O'Connor had championed the use of an undue burden analysis in several of her dissenting opinions.[30] The *Casey* joint opinion, however, crafted an entirely new undue burden analysis and, for the first time, made it the controlling standard for evaluating all abortion restrictions. The meaning of this new standard can only fully be understood first by contrasting it with Justice O'Connor's initial formulations of undue burden, and second by analyzing how the *Casey* joint opinion defined, developed, and actually applied the standard. This Part undertakes that analysis and concludes that, although the *Casey* plurality backed away from affording women the highest level of constitutional protection for the abortion choice and stumbled in its efforts to adequately clarify the contours of the undue burden standard, the plurality nonetheless intended to provide a level of protection for the abortion right that was fully consistent with *Roe*'s core objective of "ensur[ing] that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."[31]

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29. The Court had used an "undue burden" analysis in cases involving restrictions on minors' access to abortion. *See, e.g.*, Bellotti v. Baird (*Bellotti I*), 428 U.S. 132, 147 (1976) ("A requirement of written consent . . . is not unconstitutional unless it unduly burdens the right to seek an abortion."); Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 647 (1979) (holding that a state court's construction of Massachusetts's parental consent law "would impose an undue burden upon the exercise by minors of the right to seek an abortion"). The phrase "undue burden" had also appeared in cases involving restrictions on access to public funding. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 314 (1980) (citing Maher v. Roe, 432 U.S. 464, 473-74 (1977)); *Maher*, 432 U.S. at 474 (stating that a woman is protected from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"); *see also* Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2036-37 (1994) (arguing that the term "undue burden" was not developed as a formal standard and was not used in these cases as a substitute for the *Roe* standard).

30. Justice O'Connor first argued for an undue burden standard in her dissenting opinions in *City of Akron v. Akron Center for Reproductive Health, Inc.* (*Akron I*), 462 U.S. 416, 461-64 (1983) (O'Connor, J., dissenting), and *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., dissenting), decided the same day as *Akron I*. She continued her advocacy for such a standard three years later in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 828-29 (1986) (O'Connor, J., dissenting), *Webster v. Reproductive Health Services*, 492 U.S. 490, 529-30 (1989) (O'Connor, J., concurring in part), and *Hodgson v. Minnesota*, 497 U.S. 417, 459 (1990) (O'Connor, J., concurring in part). For detailed analyses of the development of the undue burden standard in Justice O'Connor's opinions, see Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989), and Metzger, *supra* note 29, at 2036-37.

31. *Casey*, 505 U.S. at 872.

A. The Journey to the Supreme Court in the Casey *Litigation*

The Pennsylvania legislature enacted the restrictions on abortion that were challenged in *Casey* in direct response to signals that an emerging conservative Supreme Court majority was poised to overrule *Roe v. Wade*. After years of applying *Roe*'s strict scrutiny standard to strike down most abortion restrictions,[32] "the constitutional tide turned"[33] in 1989 with the Supreme Court's decision in *Webster v. Reproductive Health Services*.[34] In declaring three Missouri abortion restrictions to be constitutional, a plurality of the Court called for a "reconsideration"[35] of *Roe*'s trimester framework[36] and reviewed

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32. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 572-73 (15th ed. 2004) (describing abortion cases decided between *Roe* and *Casey* and noting that, other than denials of public funding, the Supreme Court struck down most abortion restrictions). As the composition of the Supreme Court began changing in the early 1980s, skepticism about the *Roe* trimester framework increased. *See, e.g.*, *Akron I*, 462 U.S. at 461-64 (O'Connor, J., dissenting) (urging that the *Roe* trimester framework be replaced by an undue burden standard); *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting) (restating her undue burden analysis).

33. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 24 (2d ed. 1992). For detailed discussions of the changes in the composition of the Supreme Court during the 1980s, the political strategies that led to those changes, and how the Court's new composition affected its support for *Roe v. Wade*, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 637-80 (1998), and TRIBE, *supra*, at 17-20.

34. 492 U.S. 490. The Missouri law declared that life begins at conception, required testing for viability at twenty weeks' gestational age, and banned the use of public employees and facilities for performing abortions. *Id.* at 501. *Webster* marked the first occasion on which Justice Antonin Scalia, appointed by President Reagan in 1986, and Justice Anthony Kennedy, appointed by President Reagan in 1988, participated in the Supreme Court's review of abortion restrictions. TRIBE, *supra* note 33, at 20. These two new Justices joined Chief Justice Rehnquist and Justices O'Connor and White in voting to uphold all of the challenged provisions of the Missouri law. Justices Blackmun, Brennan, Marshall, and Stevens concurred in part and dissented in part.

35. *See, e.g.*, *Webster*, 492 U.S. at 517-18 (Rehnquist, C.J.) (arguing that "the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has . . . [made] constitutional law in this area a virtual Procrustean bed" and urging "reconsideration" of the trimester framework because it had proven "unsound in principle and unworkable in practice") (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985)); *id.* at 521 (concluding that the case before the Court offered "no occasion to revisit the holding of *Roe*," thus leaving it "undisturbed," but acknowledging that, "[t]o the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases"). In contrast, Justice Scalia urged that *Roe* be overruled "explicitly." *Id.* at 532 (Scalia, J., concurring in part). Justice O'Connor, the critical fifth vote to uphold the Missouri provisions, declined to reconsider *Roe v. Wade*, arguing that the statute could be upheld under the standards of *Roe* and its progeny and that any reconsideration of *Roe* was inappropriate. *Id.* at 525 (O'Connor, J., concurring in part) ("Unlike the plurality, I do not understand these viability testing requirements to conflict with any of the Court's past decisions concerning state regulation of abortion. Therefore, there is no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade* . . . . Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so . . . ."). For an excellent critique of the *Webster* decision, see Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989).

36. *Roe* developed the trimester framework as a means of accommodating competing interests of the woman and the state. Under the trimester framework, almost no restrictions were permitted during the first-trimester. Roe v. Wade, 410 U.S. 113, 163 (1973). During the second-trimester, the government could "regulate the abortion procedure in ways that are reasonably related to maternal health," but not to further the State's interest in potential life. *See id.* at 164. During the third-trimester, subsequent to fetal viability, the government could prohibit abortions entirely except if necessary to save the life or health of the pregnant woman. *Id.* at 164-65.

the Missouri law only to determine whether it was "reasonably designed" to advance a "legitimate" state interest.[37] In an impassioned dissenting opinion, Justice Blackmun lamented that the plurality had effectively "invite[d] every state legislature to enact more and more restrictive abortion regulations . . . [that] will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973."[38]

State legislatures agreed with Justice Blackmun's reading of the *Webster* opinion and accepted the plurality's invitation to enact new restrictions on abortion. In the months after *Webster*, two states and the territory of Guam re-enacted pre-*Roe* criminal bans on virtually all abortions.[39] In 1988 and again in the fall of 1989, the Pennsylvania legislature chose a different strategy, amending its comprehensive Abortion Control Act to add a series of highly intrusive and burdensome restrictions on abortion that fell short of outright bans. The new provisions required that: (1) physicians recite a prescribed litany of information discouraging abortion and describe the availability of state-sponsored, printed materials offering alternatives, and then delay their patient's procedure for at least twenty-four hours;[40] (2) married women notify their husbands of their abortion decision;[41] (3) young women under the age of

37. *Webster*, 492 U.S. at 520 (Rehnquist, C.J.).

38. *Id.* at 538 (Blackmun, J., dissenting); *id.* at 560 ("For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.").

39. In 1990, Guam passed a law banning nearly all abortions, as well as counseling, encouraging, or advising a woman to obtain an abortion. GUAM CODE ANN. tit. 9, §§ 31.20-.22, 31.33 (1990). In 1990, Louisiana attempted to revive its pre-*Roe* law subjecting physicians to ten years of hard labor for performing abortions. Weeks v. Connick, 733 F. Supp. 1036 (E.D. La. 1990) (invalidating the Louisiana abortion ban because it was in conflict with abortion regulations enacted subsequent to the ban). In 1991, after that attempt failed, the Louisiana legislature passed a law banning abortion except where the procedure was necessary to preserve the woman's life, the pregnancy was the result of reported rape or incest, or to preserve the life or health of the fetus or to remove "a dead unborn child." LA. REV. STAT. ANN. § 14:87 (1991 & Supp. 1992). In January 1991, Utah amended and re-enacted its pre-*Roe* felony criminal abortion ban. UTAH CODE ANN. § 76-7-302 (2006) (stating that abortions prior to twenty weeks' gestational age can only be performed to save a woman's life, in cases of rape or incest if reported to law enforcement, to avert grave damage to the woman's medical health or to prevent the "birth of a child" with "grave defects"; abortions after twenty weeks' gestational age can only be performed to save the woman's life, to avert grave damage to the woman's medical health or to prevent the "birth of a child" with "grave defects"). Following the Supreme Court's ruling in *Casey*, these bans were invalidated and never went into effect. *See infra* note 202 and accompanying text.

40. 18 PA. CONS. STAT. ANN. §§ 3205, 3208 (West 2000). Consent is "informed" only when a physician provides the woman with information about the nature of the abortion procedure, its risks and alternative treatments, the probable gestational age of the fetus, and the medical risks of carrying the pregnancy to term. *Id.* § 3205. Additionally, these provisions mandate that physicians or counselors offer the pregnant woman materials that give detailed descriptions and pictures of the fetus at two-week gestational increments from fertilization until full-term, as well as the names of agencies offering alternatives to abortion; and inform the woman of the availability of medical assistance benefits for prenatal care and childbirth and of the father's liability for child support if she carried the pregnancy to term. *Id.* §§ 3205, 3208.

41. *Id.* § 3209. Section 3209 exempted those women who could provide an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she had reported to law

eighteen have either the consent of one parent or a court order prior to an abortion, and that both the young woman and her parent obtain the state mandated information discouraging the abortion;[42] and (4) clinics report detailed, particularized information about every abortion patient to the state.[43] The amendments also severely narrowed the Act's existing definition of the "medical emergency" situations that would exempt women from complying with the forced waiting period, biased counseling, parental consent, and husband-notification requirements.[44] Significantly, the amendments explicitly reenacted many of the very statutory provisions of Pennsylvania's 1982 Act, which the Supreme Court had held unconstitutional in *Thornburgh v. American College of Obstetricians & Gynecologists* just a few years earlier.[45] As their chief legislative architect and sponsor admitted, the new amendments were explicitly and unabashedly designed to trigger a challenge to *Roe v. Wade* that would lead to its overturning and a return to criminal bans on abortion.[46]

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enforcement; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. *Id.*

42. *Id.* §§ 3205, 3206 (West 2000).

43. *Id.* §§ 3207(b), 3214(a) & (f) (West 2000). Section 3214(a)(12) required the reporting of a married woman's "reason for failure to provide notice" to her husband. *Id.* § 3214(a)(12).

44. *Id.* § 3203 (West 2000) (narrowly defining medical emergency as a condition so dangerous "as to necessitate the immediate abortion of [the] pregnancy to avert [the woman's] death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function").

45. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down, inter alia, Pennsylvania's "informed consent" requirements and regulations mandating the filing of detailed reports that were made available to the public); *see also* City of Akron v. Akron Ctr. for Reprod. Health (*Akron I*), 462 U.S. 416 (1983) (striking down, inter alia, Ohio's "informed consent" and mandatory 24-hour waiting period provisions). Following *Akron I*, the Commonwealth of Pennsylvania conceded the invalidity of certain provisions of the Act, including the 24-hour mandatory delay and physician-only counseling provisions. Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 293 (3d Cir. 1984). Thus, the constitutionality of those provisions was not before the Supreme Court in *Thornburgh*. For a thorough summary of the history of abortion regulation in Pennsylvania, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1326-28 (E.D. Pa. 1990).

46. *See, e.g.*, Stephen Freind, *Pennsylvania's Response to* Webster*: A Strategy for Further Challenging* Roe v. Wade, *in* ABORTION AND THE STATES: POLITICAL CHANGE AND FUTURE REGULATION 309, 310-11 (Jane B. Wishner, ABA ed., ABA 1993) ("We . . . see these bills as opportunities to go to the U.S. Supreme Court and give the Court an opportunity to challenge *Roe v. Wade* and now *Webster* . . . . We interpreted the Court's ruling in *Webster* as saying that the states can have additional regulation of abortion, and even in some cases outlaw abortions, if there is a rational basis for doing so. We looked at *Webster* as a window of opportunity, and we were determined to crawl through that window as quickly as possible.") (footnotes omitted); Memorandum from Stephen F. Freind to Members of Pennsylvania House of Representatives (Sept. 27, 1989) (on file with the authors) (identifying one of the purposes of 1989 Abortion Control Act as being to trigger judicial overruling of *Roe v. Wade*); *see also Casey*, 744 F. Supp. at 1372-73 ("The hostility of Pennsylvania's legislature to the protection of a woman's right of privacy to choose abortion is apparent from the history of the legislation purporting to regulate abortion in Pennsylvania . . . . This hostility is equally apparent in the 1988 and 1989 amendments . . . . Clearly, the Commonwealth of Pennsylvania seeks to challenge the very foundation of *Thornburgh* and those cases that preceded it, including *Roe v. Wade*.").

In the ensuing facial challenge[47] to the Pennsylvania restrictions, the Commonwealth of Pennsylvania defended the constitutionality of the new law by arguing that the courts should apply the undue burden concept developed by Justice O'Connor in her dissenting opinions in *City of Akron v. Akron Center for Reproductive Health* and *Thornburgh* or, alternatively, overturn *Roe v. Wade* wholesale.[48] Relying principally on *Roe*, *Thornburgh*, and *Akron*, and following a three-day bench trial, the district court enjoined virtually all of the challenged restrictions, explicitly rejecting the Commonwealth's effort to avoid the *Roe* strict scrutiny standard.[49] In stark contrast, the United States Court of Appeals for the Third Circuit found that *Webster v. Reproductive Health Services*[50] and subsequent opinions had eliminated *Roe*'s strict scrutiny standard.[51] Applying *Marks v. United States*,[52] the court of appeals took the unusual step of construing *Webster* and *Hodgson* as establishing a new standard of review under which to judge the constitutionality of all abortion restrictions—Justice O'Connor's undue burden standard.[53] Applying that standard as then formulated by Justice O'Connor in her dissenting opinions,[54] the court of appeals held that all challenged provisions of the Pennsylvania law

47. Throughout this Article, the phrase "facial challenge" refers to legal challenges in which a court is asked to declare an abortion law invalid on its face. In contrast, an "as-applied challenge" seeks to invalidate a statute as applied to a particular set of circumstances. The legal challenge to the Pennsylvania restrictions was brought as a facial challenge prior to their implementation. As Professor Michael Dorf has noted, the distinction between these kinds of challenges is significant: "If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances." Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994). For a discussion of the controversy over the legal standard applicable in facial challenges to abortion restrictions, see *infra* Part IV.A.1.

48. *See* Brief for Respondents at 42-53, 105-17, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902), 1992 WL 551421 at *42-53, *105-17; Defendants Casey, Richards and Preate's Memorandum of Law at 4-11, Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323 (C.A. No. 88-3228); *see also Casey*, 744 F. Supp. at 1373 ("Defendants seem to argue that the constitutional standard applicable to judicial review of abortion regulations has somehow been modified by recent Supreme Court decisions."). The Commonwealth argued that in *Webster*, 492 U.S. 490 (1989), *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and *Ohio v. Akron Center for Reproductive Health* (*Akron II*), 497 U.S. 502 (1990), the Supreme Court modified the strict scrutiny standard of *Roe*. *See, e.g.*, Defendants Casey, Richards and Preate's Memorandum of Law, *supra*, at 4-6.

49. *Id.* (rejecting arguments that *Webster*, *Hodgson*, and *Akron II* modified the strict scrutiny standard of *Roe*). Applying *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 640 (1979), the district court assessed Pennsylvania's informed parental consent requirement to determine whether it unduly burdened minors' access to abortion. *Casey*, 744 F. Supp. at 1382; *see infra* notes 97-98 and accompanying text.

50. 492 U.S. 490; *see supra* notes 34-38 and accompanying text.

51. Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 694-97 (3d Cir. 1991).

52. 430 U.S. 188 (1977).

53. *Casey*, 947 F.2d at 694-98.

54. *Id.* at 698 ("[N]o undue burden is caused by abortion regulations that do not have a 'severe' or 'drastic' impact upon time, cost, or the number of legal providers of abortions."); *id.* at 698 n.14 ("The definition of [the undue burden] standard—'absolute obstacle or severe limitation'—used by Justice O'Connor in those cases is binding . . . .").

were constitutional except the husband-notification requirement.[55] Justice Samuel Alito, then a member of the United States Court of Appeals for the Third Circuit, dissented, arguing that the majority had erred in striking down the husband-notification provision because it did not unduly burden women's access to abortion[56] and was rationally related to the "state's interest in furthering the husband's interest in the fetus."[57]

The court of appeals' maverick opinion led both sides to file petitions for certiorari,[58] setting the stage for Supreme Court review. At the time that the Supreme Court granted review, on January 21, 1992, two new Justices—David Souter and Clarence Thomas—had joined the court,[59] increasing speculation that the newly-composed Supreme Court would now explicitly overturn *Roe v. Wade*.[60]

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55. *Id.* at 699-719.

56. *Id.* at 720-25. In arguing that the husband-notification requirement did not amount to "a severe limitation" or "absolute obstacle," then-Judge Alito focused primarily on the group of women who were *not* affected by the requirement, because they would voluntarily tell their husbands. *Id.* at 722. With respect to victims of spousal abuse—the very women who *were* likely to be affected by the requirement—then-Judge Alito discounted the record evidence of the serious dangers posed to them by the husband-notification requirement. *See id.* at 723 n.6. He also deferred to the legislature's judgment that the statutory exceptions for these women were adequate, ignoring the trial court's findings that these exceptions were, in fact, woefully inadequate: "It is apparent that the Pennsylvania legislature considered this problem and attempted to prevent Section 3209 from causing adverse effects by adopting the four exceptions noted above. Whether the legislature's approach represents sound public policy is not a question for us to decide." *Id.* at 724. For a critique of then-Judge Alito's dissenting opinion in *Casey*, see Laurence H. Tribe, *Alito's World . . . and His Miscalculations*, BOSTON GLOBE, Nov. 7, 2005, at A13 ("I do wonder . . . about the window through which Alito was gazing at the social world in which the controversy arose. Was he perhaps viewing the 'burden' on married women in this situation as simply their due, as something that goes with the territory when a woman weds and thus, almost by definition, as no 'undue' burden?").

57. *Casey*, 947 F.2d at 725-27. Then-Judge Alito's opinion reflects a disturbing willingness to defer to legislative judgments about the impact of abortion restrictions on women regardless of the record evidence of serious harms that they pose. He reasoned, for example, that the court must defer to the legislature's judgments about the reasons for and the effects of the husband-notification requirement, emphasizing that legislation is not irrational "simply because it produces some adverse effects." *Id.* at 726. He concluded that the Pennsylvania legislature "presumably decided that the law on balance would be beneficial" and "[w]e have no authority to overrule that legislative judgment even if we deem it 'unwise' or worse." *Id.*

58. The plaintiffs asked the Court to reaffirm *Roe*'s strict scrutiny standard and to invalidate all of the challenged provisions under that standard. Brief for Petitioners and Cross-Respondents at 15-17, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902). The Commonwealth of Pennsylvania asked the Court to adopt Justice O'Connor's undue burden standard and to uphold all of the challenged provisions under that standard or, alternatively, to explicitly overrule *Roe v. Wade*. Brief for Respondents at 42-53; 105-17, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902). The first Bush administration, supporting the Commonwealth of Pennsylvania, asked the Court to overrule *Roe* by replacing its strict scrutiny standard with one that asks whether an abortion restriction "is reasonably designed to advance a legitimate state interest." Brief for the United States as Amicus Curiae Supporting Respondents at 15, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902).

59. Following the *Webster* decision, Justices William J. Brennan, Jr. and Thurgood Marshall, strong supporters of *Roe v. Wade*, resigned from the Court. President George H. W. Bush appointed David Souter to the Court in 1990 and Clarence Thomas in 1991. *Casey* marked the first opportunity for these new Justices to consider the constitutionality of restrictions on abortion. *See* TRIBE, *supra* note 33, at 243.

60. *See, e.g.*, Henry J. Reske, *Is This the End of* Roe*?: The Court Revisits Abortion*, A.B.A. J., May 1992, at 64 ("As the 1980s slipped into the 1990s, the once unthinkable has become the probable. The

B. *The* Casey *Joint Opinion: Preserving Protection for the Right to Abortion via a Newly Minted Undue Burden Standard*

Confounding pundits and advocates on both sides, Justices O'Connor, Kennedy and Souter coauthored[61] an opinion, joined in relevant part by Justices Blackmun and Stevens, that reaffirmed what they deemed the three central tenets of *Roe*. First, the joint opinion recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[62] Second, the joint opinion reaffirmed "the State's power to restrict abortion after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."[63] Third, the joint opinion confirmed "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[64]

In reaffirming rather than rejecting *Roe*'s core principles, the joint opinion relied heavily on the doctrine of stare decisis. The plurality found that the factual underpinnings of *Roe*'s central holding had not been weakened and that, in it's nearly two decades of application, *Roe* had proven workable.[65] The joint opinion authors expressed deep concern that overruling *Roe v. Wade* would substantially undermine the Court's integrity, given the likely public perception that reversal was due solely to the changing composition of the Court: "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[66] The *Casey* plurality also emphasized *Roe*'s important role in the lives of countless American women who had come to rely on its protections; and recognized the link between reproductive autonomy and women's autonomy and equality:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their

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Supreme Court begins its review of this year's abortion cases . . . with the realization by many that the days of the landmark *Roe v. Wade* . . . are numbered."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 795-96 (2d ed. 2002) (noting that at the time of *Casey*, "[i]t was thought that either [Souter or Thomas], and particularly Justice Clarence Thomas, might cast the fifth vote to overrule *Roe v. Wade*"); Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAG., Apr. 10, 2005, at 28 ("As the country waited for an answer from the court [in *Casey*] and with a presidential campaign well under way, advocates on both sides gave *Roe* little prospect of surviving.").

61. *See supra* note 3.

62. *Casey*, 505 U.S. at 846. As a result, the joint opinion confirmed that prior to viability "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 860.

66. *Id.* at 867; *see also id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.").

> views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives . . . . The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.[67]

Despite its strong language, however, the joint opinion also altered key aspects of *Roe v. Wade*, rejecting *Roe*'s strict scrutiny standard as well as its trimester framework and adopting a more permissive "undue burden" standard.[68] In doing so, the joint opinion authors rebalanced the relative interests of the state and the pregnant woman, emphasizing the state's interest in protecting maternal health and potential fetal life "from the outset" of the pregnancy.[69] *Roe* and its progeny permitted restrictions on pre-viability abortions only if the government could prove that they served to protect women's health.[70] In contrast, the *Casey* joint opinion allows states to regulate all pre-viability abortions to promote the state's interest in potential life or in protecting the woman's health, as long as the regulations rationally further these state interests and do not unduly burden women's access to abortion.[71] After *Casey*, challenges to pre-viability restrictions on abortion can no longer

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67. *Id.* at 856 (citation omitted); *see also id.* at 851-52 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life . . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."); TRIBE, *supra* note 33, at 255-56 (arguing that, through an "emphasis on equality, the [*Casey*] plurality sketched out a new jurisprudential foundation of the right to choose that is in many ways constitutionally firmer than the approach in *Roe*, which had somewhat paternalistically focused on the role of the attending physician in the woman's decision."). In his concurring and dissenting opinion, Justice Blackmun argued that "restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality." *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part and dissenting in part). *See generally* Sylvia A. Law, *Rethinking Sex and the Constitution,* 132 U. PA. L. REV. 955, 1013-28 (1984) (arguing that women's equality requires that they can control their reproduction); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 351-80 (1992) (arguing that abortion restrictions can violate the antidiscrimination and antisubordination principles underlying the guarantee of equal protection). For suggestions on alternatives to the legal analysis of the Court in *Roe v. Wade*, see WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005).

68. *Casey*, 505 U.S. at 872-79; *see supra* note 36 and accompanying text.

69. *Id.* at 869; *see also id.* at 872 ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself."). Our analysis here of the *Casey* joint opinion was first presented in our Memorandum in Support of Plaintiffs' Motion to Reopen Record or, Alternatively, to Stay Proceedings, Planned Parenthood of Southeastern Pennsylvania v. Casey, 822 F. Supp. 227 (E.D. Pa. 1993) (Civ. No. 88-3228).

70. Roe v. Wade, 410 U.S. 113, 163 (1973).

71. *Casey*, 505 U.S. at 872. Nevertheless, the joint opinion declined to designate the state's interest in protecting potential life as "compelling." *See infra* note 123 and accompanying text.

focus exclusively on the absence of a health justification. Rather, challengers must prove that the restrictions pose undue burdens.[72] The *Casey* joint opinion thus charted a new path for abortion regulation that undoubtedly represents less constitutional protection than that afforded by *Roe*. Yet, as discussed below, a close analysis of the *Casey* standard demonstrates that the authors of the joint opinion intended to replace the *Roe* framework with a rigorous standard that carefully examines both the actual impact of restrictions on the women they affect and the governmental purpose underlying them.

The plurality carefully articulated a new standard, which, on its face, provided stronger protection for the abortion right than Justice O'Connor's earlier iterations. In doing so, the joint opinion explicitly disavowed prior discussions of the undue burden standard,[73] and noted its agreement with the ultimate objective of *Roe*'s trimester framework—i.e., "ensur[ing] that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."[74] In "refin[ing] the undue burden analysis,"[75] the plurality rejected its narrow formulation in Justice O'Connor's prior opinions, which had defined undue burden as an "absolute obstacle[] or severe limitation[] on the abortion decision."[76] In its place, the joint opinion clarified that an undue burden exists where a regulation places "a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus."[77] Thus, under the newly-minted

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72. *Casey* thus also increased the quantum of proof required to successfully challenge restrictions on abortion. Under *Roe*, once plaintiffs proved that a statute created more than a de minimis impact upon a woman's right to choose abortion, the burden shifted to the state to demonstrate that the provisions were narrowly drawn to serve a compelling purpose. *See Roe*, 410 U.S. at 155; *Casey*, 505 U.S. at 929 & n.5 (Blackmun, J., concurring in part and dissenting in part). In contrast, *Casey* requires challengers of abortion regulations to show in the first instance that the statute "unduly burdens" the abortion right. *See Casey*, 505 U.S. at 877-79.

73. *Id.* at 876 ("The concept of undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent . . . . Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.") (citations omitted); *id.* at 877 ("To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard.").

74. *Id.* at 872. While reaffirming this objective, the joint opinion emphasized that it did not agree "that the trimester approach is necessary to accomplish [it]." *Id.*

75. *Id.* at 879.

76. City of Akron v. Akron Ctr. for Reprod. Health (*Akron I*), 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting); *see supra* note 30.

77. *Casey*, 505 U.S. at 877 (emphasis added). The papers of Justice Harry A. Blackmun, now contained in the Library of Congress, contain five drafts of the joint opinion. *See* Drafts of Joint Opinion (available in The Harry A. Blackmun Papers, Library of Congress, Madison Building, Manuscript Division [hereinafter The Blackmun Papers]; on file with the authors). An analysis of these drafts shows that the definition of the undue burden standard did evolve slightly. The first two drafts of the joint opinion, for example, defined undue burden as "a shorthand for the conclusion that a state regulation has the purpose or effect of placing *serious* obstacles in the path of a woman seeking an abortion of a non-viable fetus." 1st draft of joint op. at 32-33 (June 3, 1993), *in* The Blackmun Papers, *supra*; 2d draft of joint op. at 34 (June 22, 1992), *in* The Blackmun Papers, *supra*. In the third draft, the word "*serious*" was changed to "*substantial*." 3d draft of joint op. at 35-37 (June 25, 1992), *in* The Blackmun Papers, *supra*. References to improper legislative purpose appeared in the first draft, although subsequent drafts

formulation, regulations pose an undue burden even where they do not amount to "absolute obstacles" or "severe limitations."[78] Moreover, the joint opinion further buttressed the undue burden test by adding a second prong relating to governmental purpose. The test now encompasses not just regulations that unduly impinge upon women seeking abortion (i.e., an effects prong), but also those that are created by government with that purpose in mind:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.[79]

Finally, in defining undue burden, the Court clarified that even laws designed to further permissible state interests are unconstitutional if they place an undue burden on women seeking abortions.[80] In contrast, in prior dissenting opinions, Justice O'Connor had suggested that the undue burden analysis was merely a "threshold inquiry" and that regulations found to be unduly burdensome could be justified by compelling state interests.[81] The *Casey* joint opinion explicitly rejects this formulation, emphasizing, "[i]n our considered judgment, an undue burden is an unconstitutional burden."[82]

C. *The Joint Opinion's Application of the Undue Burden Standard*

While the joint opinion's abstract invocation of its refined undue burden analysis clearly suggests that its authors intended a relatively protective standard, deducing the meaning of the undue burden standard from the joint

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added the word "purpose" to individual sentences where it had presumably inadvertently been omitted. *Compare* 1st draft of joint op. at 34-35 (June 3, 1993), *in* The Blackmun Papers, *supra* ("Unnecessary health regulations that have the effect of presenting a serious obstacle to a woman seeking an abortion may amount to an undue burden on the right."), *with* 3d draft of joint op. at 37 (June 25, 1992), *in* The Blackmun Papers, *supra* ("Unnecessary health regulations that have the *purpose or* effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.") (emphasis added).

78. *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting).

79. *Casey*, 505 U.S. at 877 (emphasis added). The joint opinion also makes clear that regulations "designed to persuade [women] to choose childbirth over abortion" must be "reasonably related to that goal." *Id.* at 878.

80. *Id.* at 877 ("Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional . . . . The answer is no.") (citation omitted); *see infra* note 106 and accompanying text. The mere fact, for example, that a legislature concluded that the burdens posed by the spousal-notification provisions were justified, as then-Judge Alito argued in voting to uphold the Pennsylvania spousal-notification provision, *see supra* note 56, is not determinative.

81. *Akron I*, 462 U.S. at 463 (O'Connor, J., dissenting) ("The 'undue burden' required in the abortion cases represents the threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard.").

82. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 877.

opinion's application of it to the Pennsylvania law is more difficult. On the one hand, the undue burden standard was strong enough to invalidate the husband-notification provision and its related reporting requirement. On the other hand, several provisions of the Pennsylvania law, including the mandatory waiting period, survived the joint authors' application of the undue burden standard. Yet, even while upholding some of the Pennsylvania restrictions, the joint authors signaled that the new standard was meant to provide reasonable protection and that those very provisions might not survive under a different factual record.

The joint opinion's analysis of the husband-notification and reporting provisions, sections 3209 and 3214(a)(12) of the Pennsylvania Act respectively, contains much that protects a woman's right to choose abortion. The joint opinion explicitly rejected the Commonwealth of Pennsylvania's argument that the husband-notification requirement imposed no undue burden because the vast majority of married women voluntarily tell their husbands of the abortion decision and thus "only one percent of the women who obtain abortions" are actually affected by the requirement.[83] The joint opinion emphasized:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.[84]

In focusing on those women who are the "real target" of the husband-notification requirement,[85] the joint opinion authors rejected the Commonwealth's rights-by-numbers approach that would deny constitutional protection to the very women affected by the law because this group consisted of only a small number of women.[86] Moreover, in invalidating the husband-notification provision on its face even though the plaintiff-providers had not shown that it would be invalid in *all* circumstances, the Justices implicitly rejected the Solicitor General's claim that, under *United States v. Salerno*,[87]

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83. *Id.* at 894.

84. *Id.*

85. *Id.* at 895.

86. Indeed, the Commonwealth alleged that the effects of the spousal-notification requirement would be "felt by only one percent of the women who obtain abortions. . . . [Moreover] some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions." *Id.* at 894.

87. 481 U.S. 739, 745 (1987). In holding that the Bail Reform Act of 1984 was not facially invalid, the Court stated in *Salerno* that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.*

Casey was not the first occasion on which the Supreme Court decided facial challenges to abortion restrictions without applying the "no set of circumstances" standard. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 450-51 (1990) (invalidating on its face two-parent notification statute, in part,

facial challengers must prove that there is "no set of circumstances . . . under which [the challenged regulation] would be valid."[88] Instead, the joint opinion found that the providers had met their burden of proof under the new standard because "*in a large fraction of the cases* in which [the legislation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[89]

In applying the undue burden standard to the husband-notification provision, the joint opinion authors were strikingly sensitive to the specific social context in which forced husband-notification would operate, connecting and understanding the interrelationship between domestic violence and women's reproductive autonomy. The Justices gave great deference to the detailed factual findings of the district court that documented the severity and pervasiveness of domestic violence, the inadequacy of the statutory exceptions to the notification requirement, and the grave dangers posed by forcing victims of domestic battering and marital rape to notify their husbands of their abortion. These findings, together with numerous other independent social science studies,[90] led the joint opinion authors, with Justices Blackmun and Stevens, to conclude that the spousal notification requirement amounted to an undue burden.[91]

A requirement that all women be affected by an abortion restriction would have considerably diluted the degree of constitutional protection:

> It would be difficult to justify a constitutional test that permitted states to enact restrictions that wholly precluded choice for some women merely because those restrictions would not constitute an "undue burden" for other, more fortunate women. Such an approach would simply draw a social and economic line across society, above which

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because in "dysfunctional families" the statute proved "positively harmful to the minor and her family"); City of Akron v. Akron Ctr. for Reprod. Health (*Akron I*), 462 U.S. 416, 434-39 (1983) (invalidating a law requiring that all second-trimester abortions be performed in a hospital even though the requirement might be valid as applied to abortions later in the pregnancy). *See generally* Dorf, *supra* note 47, at 272 (noting that the Supreme Court has often decided facial challenges in the abortion context without applying the *Salerno* standard).

88. *Salerno*, 481 U.S. at 745; *see* Brief for the United States as Amicus Curiae Supporting Respondents at 19, *Casey*, 505 U.S. 833 (Nos. 91-744 and 91-902), 1992 WL 12006421. The *Casey* joint opinion did not explicitly address *Salerno* and did not elaborate on the reasons for its inapplicability in the abortion context. However, in declaring the husband-notice provision facially invalid, the joint opinion emphasized that "the significant number of women who fear for their safety . . . are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Casey*, 505 U.S. at 894. Pre-enforcement facial invalidation, thus, was essential because Pennsylvania's mandatory spousal-notification effectively forced these women to choose between putting their lives in jeopardy and foregoing their constitutional right to abortion entirely. *See infra* notes 214-217 and accompanying text.

89. *Casey*, 505 U.S. at 895 (emphasis added).

90. In addition to crediting eighteen fact findings by the trial court, the joint opinion took judicial notice of studies by the American Medical Association, the Federal Bureau of Investigation, and many individual social scientists. *Id.* at 891-92.

91. *Id.* at 897 ("The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.").

> women would be able to have safe and legal abortions, and below which women would be returned to illegal and dangerous alternatives.[92]

The joint opinion's insistence on both an empirical, quantitative inquiry and one that focuses on the particular women affected by an abortion law strengthened the undue burden standard significantly. Moreover, the focus on a fact-bound measure of the burdens imposed on women avoids non-empirical subjective judgments by judges about whether a burden is too heavy. Rather, the inquiry properly focuses on whether the empirical record shows that the restrictions are likely to pose substantial obstacles for certain women.

The joint opinion's analysis of the spousal notification provision is also noteworthy because it explicitly recognized and condemned the outmoded conception of married women's autonomy that underlay this requirement. The joint opinion deemed the notification requirement an impermissible "dominion" of husbands over wives reminiscent of long-abandoned views of married women's subordinate status:

> Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power; even where that power is employed for the supposed benefit of a member of the individual's family.[93]

In contrast, the joint opinion's well-reasoned, highly contextualized analysis of the spousal notification provision is difficult to reconcile with its application of the undue burden standard to uphold other provisions of the Pennsylvania law. Indeed, the joint opinion has been widely criticized by commentators who have correctly noted the perplexing inconsistency between its treatment of the spousal notification provision and most of the other challenged provisions.[94]

In upholding Pennsylvania's mandatory twenty-four-hour waiting period, the joint opinion authors took note of extensive findings by the district court that documented the serious burdens posed by this requirement:

> [B]ecause of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion must make at least two visits to the doctor . . . . [T]he District Court found that for those women who have the fewest

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92. Dellinger & Sperling, *supra* note 35, at 103.

93. *Casey*, 505 U.S. at 898.

94. *See, e.g.*, Metzger, *supra* note 29, at 2036-38; Martha A. Field, *Abortion Law Today*, 14 J. LEGAL MED. 3, 13-16 (1993); [Supreme Court] Note, *Leading Cases*, 106 HARV. L. REV. 162, 206 (1993).

> financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers or others, the 24-hour waiting period will be "*particularly burdensome.*"[95]

While noting that "[t]hese findings are troubling in some respects" and that the constitutionality of the waiting period posed a "closer question" than that of other challenged provisions, the joint opinion refused, with no satisfactory explanation, to find a constitutional violation.[96] The joint authors reasoned that

> We do not doubt that, as the District Court held, the waiting period has the effect of 'increasing the cost and risk of delay of abortions,' but the district court did not conclude that the increased costs and potential delays amount to substantial obstacles . . . . We also disagree with the District Court's conclusion that the 'particularly burdensome' effects of the waiting period on some women require its invalidation. *A particular burden is not of necessity* a substantial obstacle.[97]

Thus, as Professor Laurence Tribe has argued, "[i]n large part, the plurality based its decision—somewhat hypertechnically—on the district court's own characterization of the waiting period as 'particularly burdensome' rather than a 'substantial obstacle.'"[98] The plurality's reasoning on this point is especially illogical and troubling given that at the time the district court made its factual findings the *Roe v. Wade* strict scrutiny standard remained in place, and the undue burden standard as then formulated by Justice O'Connor used significantly different terminology and required different proof. To expect the district court to have intuited the new standard—and to have foretold its specific requirement that restrictions have the "purpose or effect of placing a substantial obstacle" on the right to choose abortion—was unreasonable and created uncertainty about the meaning of the new standard. Moreover, while the joint opinion authors easily recognized that forcing married women to notify their husbands was grounded in archaic sex-role stereotypes, in upholding the state-mandated counseling scripts as a "reasonable measure designed to ensure an informed choice,"[99] they turned a blind eye to the reality that both this requirement and the mandatory waiting period likewise "rest[ed] on outmoded and unacceptable assumptions about the decisionmaking capacity of women."[100]

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95. *Casey*, 505 U.S. at 885-86 (citations omitted) (emphasis added).

96. *Id.*

97. *Id.* at 886-87 (emphasis added). The plurality invoked its expansive reading of the Act's medical emergency definition, *see infra* notes 103-104 and accompanying text, in refusing to conclude that "the waiting period imposes a real health risk." *Id.* at 886.

98. TRIBE, *supra* note 33, at 249; *see also* Field, *supra* note 94, at 16 (noting that the district court "had not found a 'substantial burden' largely because that was not yet required and therefore the court was not looking for one").

99. *Casey*, 505 U.S. at 883.

100. *Id.* at 918 (Stevens, J., concurring in part and dissenting in part); *see* David H. Gans, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1895 (1995) (criticizing the joint opinion for failing to "perceive the interest in

Also troubling was the plurality's unwillingness either to examine the district court's factual findings of the burdens posed by the informed parental consent provision or to consider the extensive social science data documenting the harmful effects of parental consent requirements.[101] In contrast to its willingness to ground its analysis of the husband-notification requirement in the context of the realities of women's lives, the joint opinion summarily rejected the providers' arguments against parental consent as a "reprise of their arguments" on other provisions, engaging in no analysis whatsoever of the factual record that documented the experiences of young women and the unique difficulties they face in accessing abortion.[102]

Although these shortcomings in the joint opinion's analysis raise serious concerns, the plurality's application of the undue burden standard to uphold some of the challenged provisions also had positive aspects. The validation of Pennsylvania's narrow definition of "medical emergency," for example, was conditioned on an insistence that it be construed broadly to encompass three life-threatening medical conditions that the district court found were not covered by the statute.[103] In doing so, the plurality emphasized that if the narrow definition of medical emergency foreclosed the possibility of an immediate abortion in the face of "significant" health risks, "we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health."[104] In its analysis of this provision, the joint opinion authors thus underscored their continuing commitment that the lives and health of women remain paramount over the State's interest in restricting abortion.

Additionally, in upholding the challenged recordkeeping and reporting requirements of the Pennsylvania statute, the joint opinion first carefully scrutinized these requirements to determine if they were "'reasonably directed to the preservation of maternal health and . . . properly respect a patient's confidentiality and privacy.'"[105] The plurality also made clear that even though these provisions were, in its view, reasonably related to the State's interest in preserving women's health, they would nonetheless be invalid if they had the

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discouraging abortion as an interest in forcing women to bear children" and not "recogniz[ing] in such regulations stereotypical assumptions about women's obligations as mothers").

101. *Casey*, 505 U.S. at 899-90 (joint opinion). The joint opinion ignored the district court's ample findings that the Pennsylvania provision created obstacles far harsher than any prior parental consent statute because it forced both the parent and the young woman to come to the abortion provider for mandatory counseling. *See* Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1382-84 (E.D. Pa. 1990). For an in-depth critique of the *Casey* joint opinion's analysis of the informed parent consent requirement, see [Supreme Court] Note, *supra* note 94, at 206-10.

102. *Casey*, 505 U.S. at 899-90.

103. *Id.* at 879-80 (agreeing with the court of appeals that the statutory definition of medical emergency includes pre-eclampsia, inevitable abortion, and prematurely ruptured membranes).

104. *Id.* at 880.

105. *Id.* at 900 (quoting Planned Parenthood of Cent. Miss. v. Danforth, 428 U.S. 52, 80 (1976)).

purpose or effect of placing substantial obstacles in the path of women seeking abortions.[106] In finding that the recordkeeping and reporting provisions did not impose a substantial obstacle, the joint authors interpreted the record as establishing only that these provisions might increase the cost of abortions by "a slight amount," but conceded that "at some point increased cost could become a substantial obstacle."[107] This concession again demonstrates that the joint authors intended the newly formulated undue burden standard to provide substantially broader protection for the abortion right than that envisioned by Justice O'Connor in her prior formulations of undue burden. As Professors Estrich and Sullivan highlighted in their excellent pre-*Casey* critique of Justice O'Connor's undue burden concept, she "ha[d] never acknowledged that significant cost increases constitute 'burdens' on abortion."[108] And, perhaps even more troubling, even if those cost increases posed burdens, her dissenting opinions in *Akron I* and other cases demonstrated a willingness to uphold health regulations regardless of the substantial burdens posed by them.[109] The *Casey* joint opinion responds to these concerns, strengthening the undue burden analysis by protecting women against health regulations that either are not designed to protect women's health or cause price increases and other burdens that become substantial obstacles for women seeking abortions.

Finally, the authors of the joint opinion carefully limited their conclusions about the provisions that they upheld to the facts before them in the existing record. In upholding the mandatory waiting period, the plurality emphasized that it was doing so based "on the record before [the Court], and in the context of this facial challenge."[110] Likewise, the plurality carefully limited its validation of the state-scripted counseling provision, stressing that "there is no

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106. *See id.* at 900-01; *id.* at 878 ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

107. *Id.* at 901. The district court found that the mandatory disclosure of certain information would negatively affect the providers because "referring physicians and, to a lesser extent, performing physicians will terminate their relationship with the clinics." Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1371 (E.D. Pa. 1990). The district court rejected the argument that the reporting requirements posed a significant financial burden on the clinics based on the evidentiary record before it:

> The evidence of record suggests that plaintiff-clinics have, in fact, incurred additional administrative costs as a result of the reporting requirements. However, there was no testimony which suggests that any of the plaintiff-clinics have raised the fees for an abortion because of these added expenses. Further, I find that the additional cost to plaintiff-clinics is *not* so great that, in and of itself, it imposes a legally significant burden on the right to obtain an abortion.

Id. at 1391.

108. Estrich & Sullivan, *supra* note 30, at 138-39.

109. *Id.* at 140; *see, e.g.*, City of Akron v. Akron Cent. for Reprod. Health (*Akron I*), 462 U.S. 416, 467 (1983) (O'Connor, J., dissenting) ("A health regulation simply does not rise to the level of 'official interference' with the abortion decision."); Planned Parenthood Ass'n of Kan. City v. Ashcroft, 462 U.S. 476, 504 (1982) (O'Connor, J., concurring in part and dissenting in part) (stating that medical regulation that poses an undue burden can be upheld if it "'reasonably relate[s] to the preservation and protection of maternal health'") (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

110. *Casey*, 505 U.S. at 887.

evidence on this record that [the provision] would amount in practical terms to a substantial obstacle."[111] And, as noted above, the Justices acknowledged that the increased costs of recordkeeping and reporting provisions could become a substantial obstacle, upholding them only because "there is no such showing on the record before us."[112] Accordingly, as other individual members of the Court agreed,[113] the joint opinion did not finally resolve the fate of either the Pennsylvania restrictions or similar laws in other states. Rather, its findings of constitutionality were preliminary and based on a specific factual record. Indeed, in post-Supreme Court proceedings, the district court, recognizing this limitation of the joint opinion, granted the providers' request to continue their facial challenge by putting on factual proof to meet the new undue burden standard.[114] While the district court's decision was ultimately reversed on appeal, the *Casey* joint opinion nonetheless explicitly left the door open to subsequent as-applied challenges to the Pennsylvania provisions and facial challenges to similar laws in other states. The Third Circuit noted, for example, that by limiting its findings to the record before it, the *Casey* plurality "signalled that it was not announcing a *per se* rule."[115] Rather, "the Court meant that other state abortion laws require individualized application of the undue burden standard" and "a future 'as applied' challenge to the Pennsylvania Act would be possible."[116] In denying the providers' motion to stay the court of appeals' mandate, Justice Souter agreed that "litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied."[117]

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111. *Id.* at 884.

112. *Id.* at 901.

113. *See infra* notes 124, 129 and accompanying text.

114. Planned Parenthood of Se. Pa. v. Casey, 822 F. Supp. 227, 235-36 (E.D. Pa. 1993). The district court found:

> Consideration of fairness and the possibility of undue prejudice compels a decision to reopen the record in this case. Plaintiffs litigated this case in accordance with the law of the land at the time of the trial, which was the strict scrutiny framework of *Roe v. Wade*. . . . [T]he Supreme Court carefully limited its conclusions to the record before it, acknowledging that on a different record different conclusions could be reached. Plaintiffs claim that they will present evidence that shows that the amended Act has the purpose and effect of putting a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus, proof that was not necessary under prior law. To deny them this opportunity would be fundamentally unfair, as plaintiffs have essentially had the rules of the game changed while in the midst of play.

Id. at 235-36 (citations omitted).

115. Casey v. Planned Parenthood of Se. Pa., 14 F.3d 848, 861 (3d Cir. 1994).

116. *Id.* at 861-62. The court of appeals conceded that "[t]he fact-bound nature of the new standard . . . suggests that a challenge after enforcement of the Pennsylvania Act might yield a different result on its constitutionality." *Id.* at 863. The court of appeals also agreed that the Supreme Court rejected the facial challenge standard of *United States v. Salerno*. *Id.* at 863 n.21; *see supra* notes 87-88 and accompanying text.

117. Planned Parenthood of Se. Pa. v. Casey, 510 U.S. 1309, 1313 (1994) (citing Fargo Women's Health Org. v. Schafer, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay)). Justice Souter noted, however, that "there is no occasion to consider here the Court of Appeals' broader assertion that, even in cases where a statute's facial validity depends on an empirical record . . . a

D. The Casey *Concurring and Dissenting Opinions*

The separate opinions of individual members also provide insight into the meaning of *Casey*'s undue burden standard. Chief Justice Rehnquist and Justice Scalia, joined by Justices White and Thomas, wrote separate concurring and dissenting opinions in which they explicitly called for the overruling of *Roe v. Wade*[118]—a goal we now know they had come perilously close to achieving.[119] However, while sharply criticizing the undue burden standard as both "rootless"[120] and "inherently standardless,"[121] Justice Scalia acknowledged that the joint opinion expressly "repudiate[ed] the more narrow formulations" used in past opinions and that the "strong adjectives [of past opinions] are conspicuously missing from the joint opinion, whose authors have . . . now determined that a burden is 'undue' if it merely poses a 'substantial' obstacle to abortion decisions."[122] Justice Scalia criticized the joint opinion authors for "stealthily downgrad[ing]" the State's interest in "unborn human life . . . [from a 'compelling interest'] to a merely 'substantial' or 'profound' interest."[123] He also recognized that "the 'undue burden' standard may ultimately require the

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decision rejecting one such challenge must be dispositive as against all other possible litigants." *Id.* at 1311 n.3.

118. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."); *id.* at 980 (Scalia, J., concurring in part and dissenting in part) ("The issue is whether [the right to choose abortion] is a liberty protected by the Constitution of the United States. I am sure it is not.").

119. Significantly, the papers of Justice Blackmun reveal that Chief Justice Rehnquist and Justices White, Scalia, and Thomas, along with Justice Kennedy, voted in conference to uphold all of the challenged provisions of the Pennsylvania law. The Blackmun papers contain a first draft of this five-member majority opinion, dated May 27, 1992, authored by Chief Justice Rehnquist. The draft opinion concludes that "the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a 'fundamental right' that could be abridged only in a manner which withstood 'strict scrutiny.'" First Draft of Chief Justice Rehnquist at 11 (May 27, 1992) (available in The Blackmun Papers, *supra* note 77; on file with the authors). Effectively overruling *Roe v. Wade*, the opinion would have substituted a minimum rationality standard for the *Roe* strict scrutiny standard: "[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." *Id.* at 12. At oral argument before the Supreme Court, Solicitor General Kenneth Starr, arguing on behalf of the United States, would only acknowledge one specific instance in which an abortion ban could not survive such rational basis review: "a complete prohibition that had no exception for the life of [the] mother." Transcript of Oral Argument at 48, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902).

120. *Casey*, 505 U.S. at 988 (Scalia, J., concurring in part and dissenting in part).

121. *Id.* at 992 (arguing that the "standardless nature" of the undue burden standard "invites the district judge to give effect to his personal preferences about abortion").

122. *Id.* at 988-89. *But see id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part) ("The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade* . . . but beats a wholesale retreat from the substance of that case.") (citation omitted); *id.* at 954 ("*Roe* continues to exist, but only in the way a storefront on a western movie exists: a mere façade to give the illusion of reality.").

123. *Id.* at 505 (Scalia, J., concurring in part and dissenting in part). Justice Scalia sarcastically noted that "[t]hat had to be done, of course, since designating the interest as 'compelling' throughout pregnancy would have been, shall we say, a 'substantial obstacle' to the joint opinion's determined effort to reaffirm what it views as the 'central holding' of *Roe*." *Id.*

invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively 'express[ing] a preference for childbirth over abortion.'"[124]

Justices Stevens and Blackmun each wrote separately to voice their disagreement with the joint opinion's dismantling of the trimester framework and abandonment of strict scrutiny.[125] Yet, in doing so, both Justices expressed confidence that the new standard would ultimately ensure meaningful protection for a woman's right to choose abortion. In arguing that the challenged provisions were unconstitutional under either *Roe*'s strict scrutiny standard or the new undue burden test, Justice Stevens noted his belief that the undue burden standard represented more than just rhetorical preservation of abortion rights:

> The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justifications will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.[126]

Roe's author, Justice Blackmun, made an impassioned case for retaining the *Roe* trimester framework, yet openly expressed his relief that *Roe*'s central holding had been reaffirmed: "But now, just when so many expected the darkness to fall, the flame has grown bright . . . . Make no mistake, the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage and constitutional principle."[127] Justice Blackmun praised the authors of the joint opinion for striking down the husband-notification provision, and noted that, in doing so, "the Court has established a framework for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice . . . . [a]nd in applying its test, the Court remains sensitive to the unique role of women in the decisionmaking process."[128] While disagreeing with Justice Scalia on everything else, Justice Blackmun agreed that the new standard had been used to uphold the Pennsylvania provisions only based on the record before the Court, and that it might ultimately be applied to invalidate those very provisions:

> [W]hile I believe that the joint opinion errs in failing to invalidate the other regulations, I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it . . . . I am confident that in the future evidence will be produced to show that

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124. *Id.* at 992-93.

125. *Id.* at 914-20 (Stevens, J., concurring in part and dissenting in part); *id.* at 926-40 (Blackmun, J., concurring in part and dissenting in part).

126. *Id.* at 920 n.6 (Stevens, J., concurring in part and dissenting in part).

127. *Id.* at 922-23 (Blackmun, J., concurring in part and dissenting in part).

128. *Id.* at 924-25.

> "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion."[129]

Justice Blackmun's personal papers from the *Casey* litigation, now housed at the Library of Congress, also reveal his optimism that the new undue burden standard would adequately protect *Roe*'s core principles. Upon learning from Justice Kennedy that he had decided to join forces with Justices O'Connor and Souter in the joint opinion,[130] Justice Blackmun wrote: "*Roe* sound, th[ough] not trimester sys[tem]."[131] As Linda Greenhouse recently argued, "The choice of this slightly old-fashioned word was significant. To a lawyer, 'sound' conveys not just survival but correctness and legitimacy."[132] Following his retirement from the Court, Justice Blackmun expressed admiration for the joint opinion authors' "robust view of individual liberty and the equal protection undertone of their opinion and their respect for *stare decisis*" and remained steadfast in his optimism that *Roe* would remain sound: "I am optimistic that the joint opinion of Justices O'Connor, Kennedy, and Souter in the *Casey* case will generally stand, and that those three Justices will continue to reaffirm *Roe*'s holding."[133]

III. POST-*CASEY* SUPREME COURT UNDUE BURDEN JURISPRUDENCE

The Supreme Court has elaborated the undue burden standard's precise contours in only three cases that produced full opinions from the Court:[134]

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129. *Id.* at 926.

130. On May 29, 1992, Justice Kennedy, who had initially voted to uphold the Pennsylvania law under rational basis review, *see supra* note 119, sent Justice Blackmun a handwritten note in which he asked to see Blackmun: "I want to tell you about some developments in Planned Parenthood v. Casey, and at least part of what I say should come as welcome news." Note from Justice Anthony M. Kennedy to Justice Harry A. Blackmun (May 29, 1992) (available in The Blackmun Papers, *supra* note 77; on file with the authors). The next day when the two met, Kennedy revealed that he was joining forces with Justices O'Connor and Souter to reaffirm the central holding of *Roe v. Wade*. *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 203-04 (2005).

131. Handwritten notes by Justice Harry A. Blackmun (undated) (available in The Blackmun Papers, *supra* note 77; on file with the authors).

132. GREENHOUSE, *supra* note 130, at 204.

133. The Harry A. Blackmun Oral History Project, Interview by Harold Hongju Koh, Professor, Yale Law School, with Justice Harry Blackmun in New Haven, Conn., at 504 (June 20, 1995) (available in The Blackmun Papers, *supra* note 77; on file with the authors). Indeed, Justice Blackmun held out hope that the Court would ultimately readopt the strict scrutiny standard. *Id.*

134. Although the Court has only applied the undue burden standard on three occasions, *Casey*'s precedent has solidified and expanded constitutional protection for personal autonomy in other contexts. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003). In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and striking down Texas's criminal sodomy statute, Justice Kennedy relied heavily upon *Casey*'s concepts of liberty, dignity, and autonomy. As one commentator has noted: "By reaffirming and validating this expansive notion of personal autonomy, *Lawrence* helps to rehabilitate its long-criticized lineage of reproductive rights cases, placing them on firmer legal footing than ever before." Cynthia Dailard, *What* Lawrence v. Texas *Says About the History and Future of Reproductive Rights*, *in* 6 GUTTMACHER REP. ON PUB. POL'Y 4, 6 (Oct. 2003); *see also* Katheryn D. Katz, Lawrence v. Texas: *A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN'S RTS. L. REP. 249 (2004)

Mazurek v. Armstrong,[135] *Stenberg v. Carhart*,[136] and *Ayotte v. Planned Parenthood of Northern New England*.[137] While these opinions taken together stopped short of providing the clear guidance some lower courts sought,[138] the Court reaffirmed and in some ways strengthened the protection announced in *Casey*, albeit by a slim margin.[139]

A. Mazurek v. Armstrong

Mazurek v. Armstrong,[140] handed down in 1997, represents the Court's most thorough treatment of the purpose prong of the undue burden test since *Casey*. A group of Montana physicians and a physician-assistant, Susan Cahill, challenged a Montana statute restricting the performance of abortions to licensed physicians. Cahill was the only physician-assistant in the state who performed abortions. The plaintiffs claimed that the statute prohibiting Cahill from continuing to provide abortion services constituted an undue burden on abortion rights and amounted to a bill of attainder directed against her. The district court denied the plaintiffs' motion for a preliminary injunction, determining that the plaintiffs had not proven that they had a "fair chance of success" on the merits of either their undue burden or bill of attainder claim, despite clear evidence that the legislature's purpose in enacting the statute had been to eliminate Susan Cahill as a source of abortion care in Montana.[141] Rejecting this evidence, the district court embraced an almost impossibly high threshold for making out a purpose prong claim, concluding that plaintiffs would have had to prove that "none of the individual legislators approving the

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(arguing that *Lawrence* revitalized substantive due process in gaining majority support on the Court for an expansive notion of individual liberty); Jane S. Schachter, Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733 (2004) (contending that *Lawrence* "delivered a doctrinal punch by virtue of its surprisingly expansive language about liberty-based rights" (emphasis removed)); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341 (2004) (identifying the right recognized in *Lawrence* as an individual right to sexual self-determination). *But see* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004) (arguing that *Lawrence* recognizes a narrower view of liberty than the reproductive rights cases preceding it).

135. 520 U.S. 968 (1997).

136. 530 U.S. 914 (2000).

137. 126 S. Ct. 961 (2006).

138. *See* discussion *infra* Part IV.

139. While the Court also addressed an abortion restriction in *Lambert v. Wicklund*, 520 U.S. 292, 297 (1997), this decision was a narrow one, in which the Court upheld a Montana parental notification law on the ground that the statute was "indistinguishable" from the one upheld in *Ohio v. Akron Center for Reproductive Health* (*Akron II*), 497 U.S. 502 (1990).

140. *Mazurek*, 520 U.S. 968.

141. *Id.* at 970 (citing Armstrong v. Mazurek, 94 F.3d 566, 567-68 (1996)). Plaintiffs had presented evidence that the proponents of the physician-only restriction had engaged in a concerted campaign to drive Cahill out of practice in order to restrict the availability of abortion care, and had enacted the physician-only law as a part of that campaign. *See id.* at 979-80 (Stevens, J., dissenting).

passage of [the restriction] was motivated by a desire to foster the health of a woman seeking an abortion."[142]

On appeal from the denial of preliminary injunctive relief, the Court of Appeals for the Ninth Circuit reversed and attempted to provide some guidance on purpose prong proof by looking both at *Casey* and at legislative purpose in other constitutional settings. The *Casey* test, the court of appeals noted, inquires whether an abortion restriction "'serve[s] no purpose other than to make abortions more difficult.'"[143] Commenting that "the Supreme Court has not elaborated on the means of determining legislative purpose under the *Casey* standard,"[144] the appeals court turned to *Miller v. Johnson*[145] and *Shaw v. Hunt*,[146] a pair of legislative redistricting cases, to flesh out the standard: "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.'"[147] Furthermore, the proof of such an impermissible purpose "may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment."[148] The appeals court refrained from ruling on the merits of the preliminary injunction motion, but held that the plaintiffs had met their burden of demonstrating a "'fair chance of success'" on their purpose prong claim, and remanded the case to the district court for a determination of the balance of the equities.[149] Proceedings on remand never occurred. In the same per curiam order in which it granted certiorari, the Supreme Court issued a summary ruling reaching the merits of the plaintiffs' claims, despite the preliminary procedural posture of the case and the narrowness of the ruling below.

Far from solidifying the undue burden standard, *Mazurek* injected it with an element of uncertainty. Starting with the observation that the plaintiffs had produced insufficient evidence to establish that the physician-only law would have the unconstitutional effect of posing a substantial obstacle to abortion, the Court flirted with the suggestion that an unconstitutional purpose standing alone would not suffice to invalidate an abortion restriction:

> But even assuming the correctness of the Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the

142. Armstrong v. Mazurek, 906 F. Supp. 561, 567 (D. Mont. 1995).

143. *Armstrong*, 94 F.3d 566, 567 (1996) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992)).

144. *Id.* at 567.

145. 515 U.S. 900 (1995).

146. 517 U.S. 899 (1996).

147. *Armstrong*, 94 F.3d at 567 (citing *Miller*, 515 U.S. at 916); *see also Miller*, 515 U.S. at 920 (holding that Georgia's redistricting legislation violated the Equal Protection Clause after determining that race was the "predominant, overriding factor" motivating the legislature).

148. *Armstrong*, 94 F.3d at 567 (citing *Shaw*, 517 U.S. at 899-906); *see also Shaw*, 517 U.S. at 905 (permitting plaintiffs to prove impermissible motive through circumstantial evidence of the district's shape or demographics, or through direct evidence of legislative purpose).

149. *Armstrong*, 94 F.3d at 567-68 (citing Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1319 (9th Cir. 1994)).

> constitutionally protected right to abortion without the *effect* of interfering with that right (here it is uncontested that there was insufficient evidence of a "substantial obstacle" to abortion) could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here.[150]

With the waters thus muddied,[151] the Court refused to discuss whether the court of appeals had identified the correct method for determining improper legislative purpose in this context—*Miller*'s and *Shaw*'s close scrutiny of the totality of the circumstances, the inquiry into whether the improper purpose was the "predominant factor" motivating the legislature, and the inferences drawn from the statute's structure and legislative history.[152] Significantly, the Court did not repudiate that mode of analysis for abortion cases. Rather, the Court focused upon the absence of evidence establishing an adverse impact on women's access to abortion[153] and the absence of direct evidence of evil motive on the part of Montana legislators.[154]

Justice Stevens, joined by Justices Ginsburg and Breyer, dissented, arguing that, "[w]hen one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's predominant motive . . . was to make abortions more difficult."[155] As Justice Stevens noted recently, the determination of an improper legislative purpose is a "manageable judicial task."[156] In not looking more searchingly into the motives of the Montana legislature, the *Mazurek* Court imparted an element of confusion to an inquiry that it has undertaken in numerous other

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150. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997).

151. Caitlin Borgmann, for example, notes that "*Mazurek* calls into question whether an improper purpose alone could ever suffice to invalidate an abortion restriction." Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675, 691 n.10 (2004).

152. *Mazurek*, 520 U.S. at 974 n.2. The Court reasoned that it was unnecessary to address the court of appeals' reading of *Miller* and *Shaw* because the record did not support a determination that the legislature's predominant motive was to create a substantial obstacle to abortion. *Id.*

153. *See id.* at 974.

154. The Court reasoned that the fact that the purported health justification for the Montana law was contradicted by available studies did not support a finding of improper purpose because "states have broad latitude to decide that particular functions may be performed only by licensed physicians, *even if an objective assessment might suggest that those same tasks could be performed by others*." *Id.* at 973 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992)). The Court also summarily rejected evidence that an anti-abortion group had drafted the Montana law because it "[said] nothing significant about the legislature's purpose in passing it." *Id.* The Court also found that the fact that the law affected only a single practitioner contradicted a finding of improper legislative motive, especially since "no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available." *Id.* at 974.

155. *Id.* at 980 (internal citation omitted). Justice Stevens further complained that the case did not have "sufficient importance to justify review of the merits at this preliminary stage of the proceeding," *id.* at 977, but that, since review had been granted, the Court "should provide some enlightenment as to whether the Court of Appeals misread this Court's opinions in *Miller* and *Shaw v. Hunt*," *id.* at 981.

156. League of United Latin American Citizens v. Perry, 126 S.Ct. 2594, 2632 (2006) (Stevens, J., concurring in part and dissenting in part) (citing Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) and Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 276-80 (1979)).

constitutional contexts.[157] Still, *Mazurek* cannot fairly be read to foreclose a finding of undue burden based on improper purpose alone, nor does it derogate from the *Miller* and *Shaw* methodology for determining legislative purpose. As discussed in Part IV below, however, lower courts have misread *Mazurek* in precisely this manner, misconstruing it as the death of the purpose prong.[158]

B. Stenberg v. Carhart

In eight separate opinions producing a 5-4 majority, the Supreme Court in 2000 struck down Nebraska's criminal ban on certain abortion procedures.[159] *Stenberg v. Carhart* was the first challenge to abortion restrictions to be fully briefed and argued to the Supreme Court since *Casey*. Eight years after *Casey*, the margin of majority support for abortion rights had thinned, but far from eroding *Casey*, *Stenberg* strengthened it.

Justice Breyer's majority opinion invalidating the Nebraska abortion procedure ban[160] began with the announcement that the Court would not "revisit those legal principles" determined by *Roe* and redetermined by *Casey*.[161] Applying those principles, the Court held that Nebraska's abortion procedure ban violated the Constitution for "at least two independent reasons."[162] First, the statute lacked any exception for procedures needed to preserve the patient's health. The Court relied on *Casey* and revived a host of pre-*Casey* holdings to support its conclusion that "the governing standard requires an exception where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother, for this Court has made clear that a State may promote but not endanger a woman's health when it

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157. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (finding an impermissible legislative purpose underlying Louisiana Creationism Act in violation of the Establishment Clause); Stone v. Graham, 449 U.S. 39 (1980) (holding a Kentucky statute requiring the posting of Ten Commandments in classrooms unconstitutional because of the statute's religious purpose).

158. Indeed, Justice Thomas warned that, after *Mazurek*, the Court would require "persuasive proof" that a legislature had acted with an unconstitutional intent. *See* Stenberg v. Carhart, 530 U.S. 914, 1008 n.19 (2000) (Thomas, J., dissenting). However, not all of the Justices appear to read *Mazurek* so broadly. *See id.* at 951-52 (Ginsburg, J., concurring) (quoting with approval Judge Posner's dissenting opinion in *Hope Clinic v. Ryan*, 195 F.3d 857, 881 (7th Cir. 1999) (Posner, J., dissenting), in which he concludes that the only possible legislative purpose of state abortion procedure ban was to express hostility to abortion rights and therein finds an undue burden).

159. Stenberg v. Carhart, 530 U.S. 914. The majority opinion, authored by Justice Breyer, was joined by Justices Stevens, O'Connor, Souter, and Ginsburg. Justices Stevens and Ginsburg each filed a concurring opinion in which the other joined. Justice O'Connor filed a separate concurrence. Chief Justice Rehnquist and Justice Scalia each filed his own dissenting opinion. Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist joined. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

160. NEB. REV. STAT. ANN. § 28-328 (Supp. 1999). This ban applied to both pre-and post-viability abortions "'in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.'" *Stenberg*, 530 U.S. at 922 (quoting NEB. REV. STAT. ANN. § 28-326(9) (Supp. 1999)).

161. *Id.* at 921.

162. *Id.* at 930.

regulates the methods of abortion."[163] The primacy of women's health has been deeply embedded in abortion decisions since *Roe*; *Stenberg* confirmed *Casey*'s holding that the absence of a health exception in an abortion restriction constitutes an independent ground for a holding of unconstitutionality.

In identifying an explicit statutory health exception as a sine qua non of abortion restrictions whenever substantial medical authority deemed one necessary, the *Stenberg* Court headed off a key strategy of abortion rights opponents, who have long sought to narrow the application of the health rationale[164] and downplay the importance of access to abortion for women's health. In the view of the *Stenberg* dissenters, the health exception essentially strips states of their authority to regulate physicians' abortion practice.[165] The recognition of a right to any abortion procedure required to preserve a woman's health or prevent damage to her health, according to the dissenters, opened an ever-expanding loophole in abortion jurisprudence, investing the doctor with unfettered and unreviewable discretion to perform whatever procedure he or she deemed necessary for the health of the patient.[166] Instead, they argued, any exception for women's health—an exception which the dissenters thought unnecessary to begin with[167]—should be limited to the harm caused by continuing the pregnancy, as opposed to the greater risk posed by alternative abortion methods.[168]

The second independent ground for the holding of unconstitutionality was a finding that the procedure ban imposed an undue burden on women's ability to choose D & E abortions,[169] the most common second-trimester abortion method, thus unduly burdening the right itself. Relying on *Danforth*,[170] in which an abortion procedure ban was held invalid under *Roe*'s strict scrutiny test, Justice Breyer found that Nebraska's prohibition of a range of abortion

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163. *Id.* at 931 (citing Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 768-69 (1986); Colautti v. Franklin, 439 U.S. 379, 400 (1979); Planned Parenthood of Cent. Miss. v. Danforth, 428 U.S. 52, 76-79 (1976); and Doe v. Bolton, 410 U.S. 179, 197 (1973), and noting that "[o]ur holding does not go beyond those cases, as ratified in *Casey*") (internal quotation marks and citation to *Casey* omitted).

164. *See, e.g.*, *Stenberg*, 530 U.S. at 1010 (Thomas, J., dissenting) (arguing that, under *Casey*, states must make exceptions only for cases in which the life or health of the woman is threatened *by continuing the pregnancy*).

165. *See id.* at 964-65, 972 (Kennedy, J., dissenting); *id.* at 1012-13 (Thomas, J., dissenting); *id.* at 953 (Scalia, J., dissenting).

166. *Id.* at 954 (Scalia, J., dissenting); *id.* at 964-65 (Kennedy, J., dissenting).

167. *Id.* at 965-66 (Kennedy, J., dissenting) (crediting Nebraska's contention that there is never a circumstance in which the banned procedure is the only procedure able to save a woman's life or health).

168. *Id.* at 1009-10 (Thomas, J., dissenting).

169. "D & E" or "dilation and evacuation" "'refers generically to transcervical procedures performed at 13 weeks gestation or later.'" *Id.* at 924 (quoting AM. MED. ASS'N, REPORT OF BOARD OF TRUSTEES ON LATE-TERM ABORTION app. 490 (1997)). The breech extraction version of an intact dilation and evacuation or "intact D & E" procedure is known as a "D & X" or dilation and extraction procedure. *Id.* at 927. Intact D & E abortions are variants of dilation and evacuation abortions. *Id.*

170. Planned Parenthood of Cent. Miss. v. Danforth, 428 U.S. 52 (1976) (striking down a criminal ban on saline induction abortions).

methods constituted an undue burden, refusing to credit Nebraska's contention that the statute would not have prevented a single abortion—it merely would have sharply restricted the doctor's choice of method. Reasoning that a criminal ban on the most common method of second-trimester abortion would foreclose access to abortion altogether for some women, Justice Breyer determined that the statute had the impermissible effect of "'placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'"[171]

It is difficult to read *Stenberg* without concluding that it significantly strengthened *Casey*. Notably, Justice Breyer wrote for five members of the Court, and while all but one of the concurring Justices wrote separate opinions, none of them quarreled with the proposition that the *Casey* standard was the controlling standard. Even Justice Kennedy, who disagreed with the majority's application of the standard, agreed on this point.[172] Thus, for the first time, a clear majority of the Court embraced a standard introduced by a three-Justice plurality less than a decade earlier. Furthermore, in this facial challenge, the Court did not require plaintiffs to prove that a large number of women would be harmed by the procedure ban before enjoining the statute as a whole, again implicitly rejecting the *Salerno* standard.[173] Perhaps most importantly, in holding that the absence of a health exception constituted an independent ground for invalidating an abortion restriction, the *Stenberg* Court placed paramount value on the protection of women's health, and refused to define that health interest narrowly.

A concurring opinion from Justice O'Connor illustrates the fragility of Justice Breyer's majority. Justice O'Connor, the majority's fifth vote, made clear that, had the Nebraska law contained an adequate health exception and had it been limited to D & X abortions only, she would have sustained its constitutionality.[174] Although six years have passed, neither Nebraska nor most

171. *Id.* at 938 (quoting *Casey*, 505 U.S. 833, 877 (1992)); *see also id.* at 945-46 ("In sum, using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.")

172. Justice Kennedy's dissent focused in large part on what he regarded as the majority's failure to give effect to *Casey*'s promise of increased deference to state legislative regulation of abortion. *See id.* at 956-57 (Kennedy, J., dissenting) ("[A] central premise [of *Casey*] was that the States retain a critical and legitimate role in legislating on the subject of abortion. . . ."). The deference Justice Kennedy believes is warranted is deference to "critical state interests" in regulating abortion procedures, *id.* at 957, particularly abortion procedures performed late in pregnancy—not blind deference to legislators' judgments about what may constitute an undue burden as a matter of law. Nowhere does Justice Kennedy indicate that those judgments are not the proper province of the judiciary, nor does he suggest that the courts should abandon their role in closely scrutinizing the purpose and effect of abortion restrictions.

173. *See supra* notes 87-88 and accompanying text.

174. *Id.* at 950 (O'Connor, J., concurring).

other states have accepted Justice O'Connor's advice.[175] Even the Federal Abortion Procedure Ban Act, enacted years after *Stenberg*, lacks the health exception that *Stenberg* requires, a fatal flaw in the eyes of the six federal courts that have reviewed it to date.[176]

C. Ayotte v. Planned Parenthood of Northern New England

The *Stenberg* Court did not agonize over the question of remedy, striking down the statute in its entirety in the context of that facial challenge. Six years later, with the composition of the Court ready to tip on a conservative fulcrum, Justice O'Connor's opinion for an eerily unanimous Court in *Ayotte v. Planned Parenthood of Northern New England*[177] left for another day any revisiting of the undue burden standard.

Ayotte was a facial challenge to a New Hampshire parental notification statute[178] prohibiting doctors from providing abortion services to minors until 48 hours had elapsed following the delivery of written notice of the abortion to the patient's parent or guardian. Relying upon *Stenberg*, *Casey*, and *Roe*, the Court of Appeals for the First Circuit held that this statute unduly burdened those minors for whom parental notification was not possible. In addition, the court of appeals looked to *Stenberg*'s holding that an explicit health exception was "a specific and independent constitutional requirement" for statutes restricting abortion.[179] The appeals court also determined that the statute's judicial bypass procedure could not be deemed an adequate substitute for a health exception.[180]

The Supreme Court ruled on *Ayotte* in the brief window of time between Justice O'Connor's announcement of her retirement and Justice Alito's confirmation hearings. This narrow opinion had the cautious and placating tone of a temporary truce. Like *Stenberg*, *Ayotte* led off with a reaffirmation of *Casey*: "We do not revisit our abortion precedents today, but rather address a

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175. *See infra* notes 339-344 and accompanying text for discussion of state abortion procedure bans post-*Stenberg*.

176. *See* Carhart v. Ashcroft, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd sub nom.* Gonzales v. Carhart, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006) (No. 05-380); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *aff'd in part sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163 (9th Cir.), *cert. granted*, 126 S. Ct. 2901 (2006) (No. 05-1382); *see infra* Part IV.A.4 (discussing lower courts' application of *Stenberg*).

177. 126 S. Ct. 961 (2006).

178. Parental Notification Prior to Abortion Act, N.H. REV. STAT. ANN. §§ 132.24-28 (2006).

179. Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 58 (1st Cir. 2004); *see supra* Part III.B.

180. As an additional basis for its holding of unconstitutionality, the appeals court found that the statute's exception for an abortion needed to save a pregnant woman's life was so vague that it would have forced doctors to "gamble with their patients' lives" by prohibiting a life-saving abortion until death was sufficiently certain or imminent. *Heed*, 390 F.3d at 63.

question of remedy. . . ."[181] Here, for the first time, a unanimous Court acknowledged that *Casey* was the controlling standard, and conceded that, "under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks."[182] Thus embracing—or at least acquiescing to—both the *Casey* undue burden standard and *Stenberg*'s health exception mandate,[183] and, for a third time, implicitly rejecting the *Salerno* standard,[184] the *Ayotte* Court unanimously held that, as written, the New Hampshire Act would violate the Constitution.[185]

This ruling, however, cast into confusion the question of what remedies would be available to plaintiffs in successful challenges to abortion restrictions. The Court noted that in *Stenberg*, the parties did not ask for any remedy narrower than the invalidation of the entire statute, guaranteeing through this comment that such an omission is unlikely to happen again. In this case, however, where New Hampshire had sought a narrower remedy that would give at least partial effect to the statute, and where the constitutionality of properly circumscribed parental notification provisions was not in doubt, the *Ayotte* Court was willing to invalidate the defective statute in only some of its applications: "If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."[186] Apparently answering Justice Kennedy's concerns about judicial overreaching that he voiced in his *Stenberg* dissent,[187] Justice O'Connor reasoned:

> Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while elevating other applications in force, or to sever its problematic portions while leaving the remainder intact. . . . Only a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a

181. *Ayotte*, 126 S. Ct. at 964.

182. The *Ayotte* Court did not reach New Hampshire's defense that the judicial bypass alternative created by the statute would suffice to protect the patient. Nor did it reach the lower court's alternative holding that the statute's life exception was too narrow.

183. *See supra* Part III.B.

184. *See supra* notes 87-88 and accompanying text.

185. Compare this acceptance of the *Casey* standard to Justice Thomas's vitriolic dissent in *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting), where he rejected the undue burden standard as "illegitimate," "without historical or doctrinal pedigree," and not meriting adherence. *See also id.* at 956 (Scalia, J., dissenting) ("*Casey* must be overruled.").

186. *Ayotte*, 126 S. Ct. at 964.

187. *Stenberg*, 530 U.S. at 978 (Kennedy, J., dissenting) ("The majority and, even more so, the concurring opinion by Justice O'Connor, ignore the settled rule against deciding unnecessary constitutional questions.").

> declaratory judgment and an injunction prohibiting the statute's unconstitutional application.[188]

Justice O'Connor was careful to insist that the limited injunction she was directing the lower courts to impose on the New Hampshire statute could not "entail quintessentially legislative work" and must be faithful to legislative intent, cautioning lower courts not to "rewrit[e] state law to conform it to constitutional requirements."[189] With these cautions, the Court vacated and remanded the First Circuit's judgment with instructions to determine whether a limited injunction could save the statute's constitutionality or whether the statute must, to remain consistent with legislative intent, be invalidated in toto.

Justice O'Connor avoided conflict within the Court by not ruling definitively on the merits of the plaintiffs' claims, thereby passing the question of the law's ultimate constitutionality to the lower federal courts—many of which, even before *Ayotte*, had been seeking greater guidance from the Supreme Court on abortion questions. Such an approach arguably requires lower courts to leave in place as much of an unconstitutional statute as possible and even to "strive to salvage it"[190] by repairing the constitutional defect through judicial decree. The *Ayotte* compromise cannot be read in isolation from the unique historical circumstances under which it arose, however, and thus should not be interpreted as a general rule that courts must err on the side of rescuing fragments of a constitutionally suspect statute. Rather, *Ayotte* can be viewed as establishing a holding pattern in the area of parental involvement regulations, a type of abortion restriction that the Court has repeatedly deemed constitutionally permissible. Indeed, *Ayotte* is most notable for what it did not do: adopt *Salerno*, retrench *Casey*, or retreat from *Casey*'s and *Stenberg*'s emphasis on the paramount mandate to protect women's health.

*D. Post-*Casey *Insights from Individual Justices*

Individual opinions by the *Casey* joint opinion authors have signaled a desire to ensure that the new standard offers meaningful protection to women's abortion right. Although the Supreme Court has not explicitly resolved the split in authority over whether to apply *Salerno*'s "no set of circumstances" test[191] to facial challenges of abortion statutes, individual Justices have repeatedly addressed it. In a concurring opinion in *Fargo Women's Health Organization v. Schafer*,[192] Justices O'Conner and Souter, denying a motion for a stay and an

188. *Ayotte*, 126 S. Ct. at 967-69 (citations omitted).

189. *Id.* at 968. Of course, if the lower federal courts were to misread *Ayotte* as a blanket authorization for the judicial rewriting of unconstitutional abortion statutes, then the result would be a federal judiciary that is highly disrespectful of the legislative sphere—quite the contrary to the deference that Justice Kennedy had been seeking in *Stenberg*.

190. *Id.*

191. *See supra* notes 87-88 and accompanying text.

192. 507 U.S. 1013 (1993) (mem.) (O'Connor, J., concurring).

injunction pending appeal, clarified that facial challenges could be sustained against abortion restrictions even if those restrictions could be constitutionally applied to some women but not to others.[193] Using the language of *Casey*,[194] these Justices clearly repudiated the *Salerno* "no set of circumstances" standard for facial challenges of abortion regulations. Instead, they reiterated *Casey*'s holding that "a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'"[195] In addition, they clarified that the lower courts must "specifically examine[] the record developed in the district court" through a fact-intensive analysis of the particular restrictions at issue, rather than mechanically applying the Supreme Court's *Casey* findings regarding the Pennsylvania statute.[196]

Dissenting from a denial of certiorari in *Ada v. Guam Society of Obstetricians and Gynecologists*,[197] Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justice White, would have granted review of the Ninth Circuit judgment striking down a Guam statute that prohibited abortions unless two physicians certified that the woman's life or health necessitated the procedure. Justice Scalia opined that, because the Guam restriction could have been applied constitutionally to post-viability abortions, under *Salerno*'s "no set of circumstances" test, the facial challenge to the Guam statute had to fail.[198] The discussion continued in *Janklow v. Planned Parenthood, Sioux Falls Clinic*.[199] Dissenting from the denial of certiorari, Justice Scalia reiterated that the undue burden standard adopted in *Casey* did not displace *Salerno*, while noting that the denial of certiorari relegated courts of appeals to "reading the tea leaves of concurring opinions" to resolve the uncertainty over the correct standard to apply in these cases.[200] Justice Stevens concurred in the denial of certiorari, and took the opportunity to blast the *Salerno* standard as unduly onerous even outside the context of facial challenges to abortion restrictions, dismissing *Salerno*'s "no set of circumstances" language as merely a "rhetorical flourish" that had resulted in a "rigid and unwise dictum" unsupported by case law and unnecessary to *Salerno*'s holding.[201]

193. *Id.* at 1014.

194. *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant.").

195. *Schafer*, 507 U.S. at 1013 (quoting *Casey*, 505 U.S. at 895).

196. *Id.* at 1014.

197. 506 U.S. 1011 (1992) (mem.) (Scalia, J., dissenting).

198. *Id.* at 1011.

199. 517 U.S. 1174 (1996) (mem.).

200. *Id.* at 1177-79 (Scalia, J., dissenting).

201. *Id.* at 1175 (Stevens, J., concurring).

IV. LOWER COURTS' APPLICATION OF THE UNDUE BURDEN STANDARD

In the years following the *Casey* decision, lower courts have had ample opportunities to apply the undue burden standard to assess the constitutionality of a wide range of restrictions on abortion. This Part analyzes the application of the undue burden test in a sampling of district court and appellate opinions. With several significant exceptions that reflect the potential vigor and strength of the *Casey* standard, many lower federal courts have not been faithful to *Casey*'s promise. To be sure, the undue burden standard has provided airtight protection against the efforts of states either to implement comprehensive criminal bans on abortion[202] or to force women to notify husbands or boyfriends before having an abortion.[203] With respect to other types of abortion restrictions, however, challenges in the lower courts have had mixed results. Some lower courts, especially those at the trial court level, have effectively implemented the mandate of *Casey* and post-*Casey* decisions, applying the undue burden standard in ways that afford meaningful protection to women seeking abortion. These courts apply a contextualized, fact-intensive analysis that acknowledges the current real-life challenges women face in accessing reproductive health care services and gives careful consideration to the ways in which the challenged restrictions exploit and exacerbate those realities and thereby unduly burden access to abortion.

In contrast, in a significant number of cases, federal courts have repudiated or misapplied the protections of *Casey*, manipulating the undue burden standard in an incremental undermining of *Roe*. These courts demand unattainably high levels of proof of undue burden, often requiring litigants to establish their case to a statistical certainty. Many of these courts disregard testimony illuminating how restrictions will affect disadvantaged women; filter

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202. *See, e.g.*, Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993) (holding Louisiana's criminal abortion ban unconstitutional); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992), *aff'd*, 102 F.3d 1112 (10th Cir. 1996), *cert. denied*, Leavitt v. Jane L., 520 U.S. 1274 (1997) (holding Utah's felony criminal abortion ban unconstitutional); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422 (D. Guam App. Div. 1990), *aff'd*, 962 F.2d 1366 (9th Cir. 1992) (holding Guam's criminal abortion ban unconstitutional); *see also supra* note 39 (discussing post-*Webster* reenactment of pre-*Roe* criminal abortion bans). In 2006, both Louisiana and South Dakota reenacted criminal bans on abortion. *See supra* note 17.

203. *See, e.g.*, Coe v. County of Cook, No. 96 C 2636, 1997 WL 797662 (N.D. Ill. Dec. 24, 1997), *aff'd*, 162 F.3d 491 (7th Cir. 1998) (dismissing a claim against a county hospital that performed an abortion on the plaintiff's girlfriend without notifying him); *Jane L.*, 809 F. Supp. 865 (holding Utah's husband-notification requirement unconstitutional); *see also* Stachokus v. Meyers, No. 67E-2002 (Pa. Ct. Com. Pl., Aug. 5, 2002) (citing *Casey* as authority for vacating an injunction obtained by a man preventing his girlfriend from obtaining abortion care and prohibiting providers from serving her) (unreported decision on file with the authors). Prior to the *Casey* decision, there were more reported decisions of legal challenges by boyfriends, but none proved successful. *See, e.g.*, Doe v. Smith, 486 U.S. 1308 (1988) (Stevens, Circuit Justice); Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974); Doe v. Smith, 527 N.E.2d 177 (Ind. 1988); Doe v. Doe, 314 N.E.2d 128 (Mass. 1974); Rothenberger v. Doe, 374 A.2d 57 (N.J. Super. Ct. Ch. Div. 1977); Steinhoff v. Steinhoff, 531 N.Y.S.2d 78 (Sup. Ct. 1988); Larrimore v. Doe, 4 Pa. D. & C.4th 186 (Pa. Ct. Com. Pl. 1989).

evidence of extreme hardship through the lens of privilege; fail to consider how challenged restrictions will operate when compounded by other restrictions; or mechanically apply the purpose or effects prong to restrictions similar to those at issue in *Casey* without any analysis of the record before them. This approach represents a trend that is inconsistent with *Casey* and post-*Casey* decisions and poses a serious threat to meaningful protection for reproductive autonomy.

A. Implementation of the Effects Prong

Most post-*Casey* legal challenges have been facial challenges that seek to demonstrate that the challenged restrictions will have an actual improper effect on women's access to abortion. This section contrasts the varying approaches of the lower courts in assessing these claims in facial challenges to waiting periods, state-prescribed counseling provisions, abortion procedure bans, and laws that impose civil liability and a variety of licensing and other requirements on abortion providers.[204]

1. Inconsistency in the Standard for Facial Challenges

The vast majority of circuits that have addressed the issue have rejected the *Salerno* "no set of circumstances" standard[205] for facial challenges and, consistent with *Casey* and other Supreme Court abortion precedents, have not required a showing that the challenged restrictions are unduly burdensome in all circumstances.[206] However, the Supreme Court's failure to explicitly repudiate the *Salerno* standard has been interpreted by courts in both the Fifth and Fourth Circuits as leaving the door open to its use in facial challenges to abortion restrictions.

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204. For a thorough analysis of post-*Casey* lower court rulings on parental involvement laws, see Amanda M. Lanham, *Parental Notification Under the Undue Burden Standard: Is a Bypass Mechanism Required?*, 37 RUTGERS L.J. 551 (2006); *see also* Jennifer Blasdell, Symposium, *Mother, May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortion Services*, 10 AM. U. J. GENDER SOC. POL'Y & L. 287 (2002) (criticizing the Supreme Court's standards for evaluating parental involvement laws because they fail to adequately protect the rights of minors); Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589 (2002) (same).

205. *See supra* notes 87-88 and accompanying text.

206. *See, e.g.*, Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 58-60 (1st Cir. 2004) (rejecting a *Salerno* facial challenge standard in the abortion context), *vacated on other grounds sub nom.* Ayotte v. Planned Parenthood of N. New England, 126 S. Ct. 961 (2006); Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 142-43 (3d Cir. 2000) (same); Planned Parenthood of S. Ariz. v. Lawall, 180 F.3d 1022, 1025-26 (9th Cir. 1999) (same); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 193-96 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998) (same); Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied sub nom.* Leavitt v. Jane L., 520 U.S. 1274 (1997) (same); Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (same), *cert. denied sub nom.* Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996); *see also* A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, A Woman's Choice-E. Side Women's Clinic v. Brizzi, 537 U.S. 1192 (2003) (reconciling the conflict between *Salerno* and *Stenberg/Casey* by holding that *Salerno* applies).

The Fifth Circuit Court of Appeals has applied the *Salerno* standard in post-*Casey* abortion challenges.[207] In *Barnes v. Moore*, for example, the court, shortly after *Casey*, upheld Mississippi's mandatory waiting period and biased counseling provision.[208] Acknowledging, but disregarding, the *Casey* analysis,[209] the court insisted that the *Salerno* standard controlled and therefore denied the plaintiff-providers the opportunity to put on factual evidence of the specific burdens imposed on Mississippi women by these provisions. Instead, the Court reasoned that the *Casey* outcome controlled because the Mississippi provisions were substantially the same as Pennsylvania's, and therefore plaintiffs could not satisfy the "heavy burden" of the *Salerno* standard.[210] Although a panel of the Court of Appeals for the Fourth Circuit recently rejected the *Salerno* standard,[211] other opinions of that court have embraced the *Salerno* standard in assessing challenges to laws requiring parental consent[212] and imposing licensing and other requirements on abortion providers.[213]

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207. *See, e.g.*, Barnes v. Mississippi, 992 F.2d 1335, 1341-42 (5th Cir. 1993) (applying the *Salerno* standard and upholding a mandatory waiting period and biased counseling provision); Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir.) (per curiam) (same), *cert. denied*, 506 U.S. 1021 (1992).

208. *Barnes*, 970 F.2d at 14. In recent years, however, some Fifth Circuit panels have expressed doubts about the applicability of *Salerno*. *See* Okpalobi v. Foster, 190 F.3d 337, 353-54 (5th Cir. 1999) (declining to decide applicability of *Salerno* facial challenge standard in striking down Louisiana's civil liability statute because statute was unconstitutional under both *Salerno* and *Casey*), *rev'd on other grounds*, 244 F.3d 405 (5th Cir. 2001); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1104 (5th Cir. 1997), *cert denied*, 522 U.S. 943 (1997), *overruled on other grounds by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (declining to decide the applicability of *Salerno* in striking down parental consent law because statute was unconstitutional under both *Salerno* and *Casey*, but noting it would be "ill-advised" to assume that the Supreme Court would abandon *Salerno*); *see also Janklow*, 517 U.S. at 1176 n.2 (Stevens, J., on denial of certiorari) ("[I]t is not at all clear to me . . . that subsequent Fifth Circuit panels would follow *Barnes*' application of the 'no circumstance' test . . . .") (citation omitted).

209. *See Barnes*, 970 F.2d at 14 n.2 ("The *Casey* joint opinion may have applied a somewhat different standard in striking down the spousal notification provision . . . . Nevertheless, we do not interpret *Casey* as having overruled, *sub silentio*, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.") (citations omitted).

210. *Id.* at 14 ("In light of *Casey*'s holding substantially identical provisions of the Pennsylvania Act facially constitutional, the plaintiffs cannot satisfy this 'heavy burden.'").

211. Richmond Medical Ctr. for Women v. Hicks, 409 F.3d 619, 627 (4th Cir. 2005) (concluding, in striking down abortion procedure ban, "that *Salerno* does not govern facial challenges to abortion regulations").

212. *See* Manning v. Hunt, 119 F.3d 254, 268 n.4 (4th Cir. 1997) (stating that, until the Supreme Court overrules *Salerno* in the abortion context, "this Court is bound to apply the *Salerno* standard"); *see also* Greenville Women's Clinic v. Bryant (*Greenville I*), 222 F.3d 157, 165 (4th Cir.) (noting that *Manning*'s discussion of *Salerno* was not dictum "because application of *Salerno* was necessary to the ruling in that case"), *cert. denied*, 531 U.S. 1191 (2000); Planned Parenthood of the Blue Ridge v. Camblos, 155 F.3d 352, 358-59 n.1 (4th Cir. 1998) (en banc) ("Because we conclude . . . that [Virginia's parental notification law] is facially constitutional under either the *Salerno* or the *Casey* standard, we need not, and do not, decide which of these two standards applies in facial challenges to abortion statutes."), *cert. denied*, 525 U.S. 1140 (1999).

213. *See, e.g.*, Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health and Envtl. Control, 317 F.3d 357, 361-63 (4th Cir. 2002) (*Greenville II*) (applying *Salerno* in the context of a claim that South Carolina abortion clinic licensing standards allowed for the standardless delegation of medical licensing to third parties); *Greenville I*, 222 F.3d at 164-65 (reviewing South Carolina abortion clinic licensing standards under both *Salerno* and *Casey* and finding them constitutional).

These decisions are directly at odds with the application of the undue burden standard in both *Casey* and *Stenberg*, in which the Supreme Court assessed the challenged provisions to determine whether they operated as a substantial obstacle in those cases in which they were relevant.[214] Thus, under *Casey* and *Stenberg*, the mere existence of some valid application of the challenged abortion restrictions does not preclude a pre-enforcement facial challenge if the restrictions pose an undue burden for some women. This analysis, which some commentators have called the functional equivalent of First Amendment substantial overbreadth review,[215] serves the vital function of protecting women against the deterrent effect of laws that by their very existence imperil women's ability to exercise the constitutional right to abortion. In voiding Pennsylvania's husband-notification provision on its face, for example, the *Casey* joint opinion emphasized that the very existence of the notification requirement chilled women in the exercise of their rights: "Whether the prospect of notification itself deters . . . women from seeking abortions, or whether the husband . . . prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*."[216] Allowing pre-enforcement facial challenges to such restrictions is essential given the practical reality that the very women most heavily burdened by them would likely not come forward to vindicate their rights.[217] In precluding facial challenges, decisions such as the Fifth Circuit's in *Barnes v. Moore* force these women to choose between sacrificing their right to abortion and enduring restrictions that threaten their health and safety.

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214. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992); *see also* Stenberg v. Carhart, 530 U.S. 914, 945-46 (2000) ("All those who perform abortion procedures using [the D & E] method must fear prosecution, conviction, and imprisonment. The result is an undue burden.").

215. *See, e.g.*, Dorf, *supra* note 47, at 271-76 (arguing that the chilling effect that justifies First Amendment overbreadth doctrine also justifies its application in abortion and other privacy jurisprudence).

216. *Casey*, 505 U.S. at 897; *see also id.* at 894 ("[T]he significant number of women who fear for their safety . . . are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.").

217. As one court recognized, the alternative of waiting until a mandatory waiting period takes effect and then mounting an as-applied challenge is unsatisfactory: "[f]or women for whom making two trips would pose a substantial obstacle to obtaining an abortion, the same factors (plus the later birth of a child) make it unlikely that they would step forward to testify about those burdens." A Woman's Choice-E. Side Women's Clinic v. Newman, 904 F. Supp. 1434, 1448 (S.D. Ind. 1995); *see also* Brief for Respondents, Ayotte v. Planned Parenthood of N. New England, 126 S. Ct. 961 (No. 04-1144) at 32 (arguing that "many women with meritorious constitutional claims would not or could not come forward to seek vindication of their rights" and that precluding a facial challenge "would unconscionably force women to choose between risking their safety and foregoing their right to an abortion.").

2. *The Special Difficulties of Challenging Provisions Similar to Those Upheld in* Casey*: Mandatory Waiting Periods and Counseling Provisions*

In the years following *Casey*, numerous legal challenges have been mounted to an ever-increasing number of mandatory waiting periods and counseling provisions[218] modeled on those upheld in *Casey*. As the district court properly recognized in *A Woman's Choice-East Side Women's Clinic v. Newman*,[219] the proper analysis in assessing challenges to these provisions is whether, based on the specific evidentiary record, they are likely to unduly burden those women affected by them. Most other courts, however, have made the mistake of mechanically imposing *Casey*'s result, rather than applying its undue burden analysis to assess these provisions.[220] For this reason, these challenges have met with very limited success in the lower courts even where the challengers have supported their claims with compelling evidence of the burdensome effects of these laws that was not available at the time of *Casey*.[221]

Some lower courts—though ostensibly rejecting the use of the *Salerno* formulation adopted by the Fifth Circuit in *Barnes*[222]—have misconstrued *Casey*'s application of the undue burden standard to Pennsylvania's mandatory

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218. *See supra* notes 9-10 and accompanying text.

219. 132 F. Supp. 2d 1150, 1151 (S.D. Ind. 2001), *rev'd*, 305 F.3d 684 (7th Cir. 2002), *cert. denied sub nom.* A Woman's Choice-E. Side Women's Clinic v. Brizzi, 537 U.S. 1192 (2003); *see* discussion *infra* notes 260-280 and accompanying text.

220. These decisions are significant both because they have foreclosed most challenges to waiting periods and because the methodological errors in them have been transported to courts' analyses of other kinds of abortion restrictions.

221. Indeed, our research found only three cases with reported decisions not subsequently reversed on appeal that have invalidated these provisions on federal constitutional privacy grounds. *See* Summit Med. Ctr. of Ala., Inc. v. Riley, 318 F. Supp. 2d 1109, 1113 (M.D. Ala. 2003) (issuing a permanent injunction against the application of biased counseling provision to women diagnosed with ectopic pregnancies and women carrying fetuses with fatal anomalies because "the state interests identified in *Casey* are not served" by providing these women with information about the father's liability for child support and alternatives to abortion); Planned Parenthood of Del. v. Brady, 250 F. Supp. 2d 405, 409-10 (D. Del. 2003) (issuing a preliminary injunction against a mandatory twenty-four-hour waiting period because the narrow health exception unduly burdened women seeking abortions in violation of *Casey*); Planned Parenthood of Del. v. Brady, No. 03-153-SLR, 2003 U.S. Dist. LEXIS 10099 (D. Del. June 9, 2003) (same, but issuing a permanent injunction); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 22-24 (Tenn. 2000) (invalidating a two-day waiting period on both state constitutional grounds and *Casey*'s undue burden standard). In other cases, challenges against these provisions have been successful on state constitutional grounds or non-privacy federal constitutional grounds such as vagueness. *See, e.g.*, Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon, 428 F.3d 1139 (8th Cir. 2005) (partially affirming order preliminarily enjoining Missouri's biased counseling requirement on vagueness grounds under the Federal Constitution); Planned Parenthood Minn. v. Rounds, 375 F. Supp. 2d 881, 887 (D.S.D. 2005) (issuing preliminary injunction against South Dakota's biased counseling provision because it violated the Federal Constitution's First Amendment); Planned Parenthood of Missoula v. Montana, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117 (Mont. Dist. Mar. 12, 1999) (enjoining enforcement of Montana's twenty-four-hour waiting period on state constitutional privacy grounds).

222. *See supra* notes 208-217 and accompanying text.

waiting period and counseling provisions as establishing, if not a per se rule, at least a strong presumption that these provisions are valid in the context of facial challenges. In an especially egregious example of this approach, the district court in *Utah Women's Clinic, Inc. v. Leavitt*[223] failed to undertake an individualized analysis of the unique burdens posed to Utah women by that state's mandatory waiting period, reasoning that "[b]ecause the two visit requirement is constitutional in Pennsylvania, it must also be constitutional in Utah—especially in the context of a facial challenge."[224] While conceding that "*Casey* did not purport to create a *per se* rule as to the constitutionality of future abortion legislation," the court summarily concluded that *Casey* controlled the outcome because plaintiffs' complaint contained "no factual allegations materially different from those already considered" in *Casey*.[225] Remarkably, without looking beyond the four corners of the complaint, the court summarily dismissed the possibility that the number and location of abortion services in Utah, and other specific circumstances, might render the forced waiting period more burdensome for Utah women than Pennsylvania women due to substantially longer travel distances and consequent increases in cost and delay.[226] The court also sharply criticized plaintiffs for bringing the case[227] and went so far as to sanction the plaintiffs' attorneys for challenging the Utah law, ordering them to pay attorney's fees and costs[228]—an order reversed on appeal.[229] Likewise, in *Fargo Women's Health Organization v. Sinner*,[230] a challenge to North Dakota's waiting period and counseling

223. 844 F. Supp. 1482 (D. Utah 1994), *rev'd in part*, 75 F.3d 564 (10th Cir. 1995), *cert. denied*, 518 U.S. 1019 (1996).

224. *Id.* at 1487. Although the court noted that the statute could be interpreted "to allow for telephonic communication," which would eliminate the burdens posed by forcing women to make two trips to the abortion provider, it concluded that this interpretation "is not necessary to uphold the constitutionality of the law under *Casey*." *Id.*; *see also id.* at 1489 ("[P]laintiffs could not . . . have argued in good faith that the Utah law had to allow for telephone communication in order to be constitutional in light of *Casey*'s constitutional validation of two face-to-face visits.").

225. *Id.* at 1490. *But see id.* (acknowledging that a state law with similar restrictions to *Casey* could be held unconstitutional if circumstances in the forum state were materially different from those in Pennsylvania).

226. *Id.* at 1491 n.11. The Court reasoned that "the most severe burden imposed by the waiting period is the same for women in both Utah and Pennsylvania—an overnight stay at a location near the clinic." *Id.*

227. *Id.* ("Plaintiffs had no case from the beginning" because "[u]nder the broad scope of *Casey*, it would be extremely difficult, if not impossible, to bring a good faith facial challenge. . . ."); *id.* at 1488 ("An informed consent requirement which requires two visits is simply not a substantial obstacle, as stated by the Supreme Court in *Casey*."). While deciding that it would apply the analysis of *Casey*, rather than *Salerno*, *id.* at 1489, the court nevertheless criticized plaintiffs for arguing that the relevant class of women should be limited "to those women who are particularly burdened by the law," *id.* at 1489 n.9. The court insisted that "[s]uch a construction . . . turns the facial challenge analysis on its head. It is no test at all. If the class is drawn too narrowly, a finding of undue burden in one abberational [sic] circumstance would be enough to strike down the law." *Id.*

228. *Id.* at 1495.

229. *See* Utah Women's Clinic, Inc. v. Leavitt, 136 F.3d. 707 (10th Cir. 1998) (per curiam).

230. 819 F. Supp. 862 (D.N.D. 1993), *aff'd sub nom.* Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir. 1994). In affirming the district court's entry of summary judgment, the Court of Appeals for the Eighth Circuit interpreted the North Dakota statute as not requiring that the state-

provision, the district court employed a similarly cursory analysis. It granted summary judgment without any factual findings or analysis of the specific burdens posed by the law on North Dakota women, based entirely on the surface similarities between the Pennsylvania provision upheld in *Casey* and the Mississippi provision upheld in *Barnes*.[231]

The refusal of these courts to undertake a fact-intensive analysis in applying the undue burden standard is a betrayal of *Casey*. Indeed, as noted above, Justice O'Connor took pains to reject this approach in her separate concurrence in *Fargo*.[232] In carefully limiting its findings on the Pennsylvania waiting period and counseling provisions to the record before it,[233] and specifically acknowledging the "closer question" posed by these provisions,[234] the *Casey* joint opinion makes clear that its analysis is not a template for similar provisions in other states. *Casey*'s fact-intensive analysis protects women's access to abortion by ensuring that regulations not deemed burdensome based on the limited record before the Court in *Casey* may still be invalidated if they prove burdensome in states with fewer abortion providers; longer travel distances between clinics; more costly abortion procedures; poorer populations; and other unique social, economic, and geographic circumstances.[235]

While other courts have undertaken a somewhat more searching, fact-intensive review than the *Leavitt* and *Fargo* courts, they nonetheless misapply the *Casey* standard, imposing unreasonably heavy burdens of proof on plaintiffs. In *Eubanks v. Schmidt*,[236] for example, the district court found that Kentucky's mandatory twenty-four-hour waiting period and counseling provision, which it assumed would require two visits for some women, did not constitute an undue burden. While recognizing that *Casey* "[did] not preordain

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mandated information be given in person, thus eliminating the burden on women of making two trips to the abortion provider. *Schafer*, 18 F.3d at 533. On this basis, the court found that the statute did not pose an undue burden within the meaning of *Casey*. *Id.* A dissenting opinion criticized the panel for failing to require the district court to "hold an evidentiary hearing and make factual findings as to whether the North Dakota provisions in question create such an undue burden." *Id.* at 536 (McMillan, J., dissenting).

231. Fargo Women's Health Org. v. Sinner, 819 F. Supp. at 865 ("Though it may be true that 'North Dakota ain't Pennsylvania,' and while the court is not unsympathetic to the burdens a woman may face when seeking to have an abortion in North Dakota, 'differences between the [North Dakota] and Pennsylvania Acts are not sufficient to render the former unconstitutional on its face.") (quoting Barnes v. Moore, 970 F.2d 12, 15 (5th Cir. 1992)). Unlike the *Leavitt* court, the Eighth Circuit in *Sinner* applied the *Salerno* standard for facial challenges, *see id.* at 864-65.

232. *Schafer*, 507 U.S. at 1014; *see supra* notes 192-196 and accompanying text.

233. *See supra* notes 110-117 and accompanying text.

234. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 885 (1992); *see supra* note 96 and accompanying text.

235. The shortage of reproductive health care providers in Pennsylvania, for example, is significantly less severe than the shortages in either Utah or North Dakota. In 2000, Pennsylvania had 73 abortion providers; in contrast, Utah had 4 and North Dakota had 2 providers. Finer & Henshaw, *supra* note 18, at 10. In 2000, 75 percent of Pennsylvania counties did not have an abortion provider; 93 percent of Utah counties and 98 percent of North Dakota counties were without abortion providers in the same year. *Id.*

236. 126 F. Supp. 2d 451 (W.D. Ky. 2000).

[the] result"[237] in the case, the court nevertheless insisted that *Casey* established "a presumption of constitutionality" with regard to those provisions it upheld.[238] In failing to find significant differences in the burdens imposed by the Pennsylvania and Kentucky laws, the court seriously misapplied the *Casey* undue burden analysis by forcing the plaintiff-providers to prove that the statute would operate as a substantial obstacle for those women who "could have obtained an abortion under the old [law], but who cannot under the new [law]."[239] The court entirely eliminated from consideration those Kentucky women most disadvantaged by poverty and other circumstances because "[f]or those women already so affected that they cannot obtain an abortion, the Statute changes little."[240] Having eliminated this group of women, the court found that the plaintiffs had not shown that the Kentucky waiting period unduly burdened a sufficient number of women to meet the *Casey* standard[241] because it "does not fundamentally alter *any of the significant preexisting burdens* facing poor women who are distant from abortion providers."[242]

This approach is deeply flawed. The *Casey* joint opinion made clear that in measuring the constitutionality of restrictive abortion laws, the proper focus is "its impact on those whose conduct it affects."[243] The joint opinion nowhere counsels that in assessing this impact courts should ignore preexisting conditions in women's lives that already make it difficult to obtain abortions. Indeed, in invalidating the husband-notification provision, the joint opinion recognized that it is these very conditions—poverty, violence, underlying health problems—that may turn certain abortion restrictions into substantial obstacles for some, and not other, women. The *Eubanks* analysis, in contrast, uses a woman's difficult life circumstances against her. A far fairer and more meaningful constitutional inquiry "is whether the obstacle or burden is, considered from [the woman's] perspective, significant or substantial. To demand more is to turn logic on its head, effectively holding that the most desperate among us can, because of that, be burdened the most."[244]

While *Eubanks* analyzed the weight of the burden placed on women by forcing them to hear state-mandated information in person, other courts have rejected challenges to mandatory waiting periods based on a finding that the physician-patient counseling can be done over the telephone, thereby

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237. *Id.* at 453.
238. *Id.* at 457.
239. *Id.* at 456.
240. *Id.*
241. *Id.*
242. *Id.* (emphasis added). The Court also rejected plaintiffs' reliance on a Mississippi study showing a decline in the number of women having abortions after the implementation of that state's mandatory waiting period. *Id.* at 456-57; *see infra* note 261.
243. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992); *see supra* notes 83-92 and accompanying text.
244. Estrich & Sullivan, *supra* note 30, at 137.

eliminating the requirement of two trips to the provider.[245] This outcome might be justified on some factual records. Here again, however, some courts woodenly apply the result in *Casey*, concluding that because the restriction is less burdensome on its face than the two-visit provision upheld in *Casey*, it must therefore pose no undue burden. In *Planned Parenthood v. Miller*, for example, the district court relied heavily on *Casey* in dismissing a challenge to a physician-only counseling requirement, summarily rejecting plaintiffs' proof of an undue burden on the women of South Dakota.[246] Plaintiffs' evidence, however, established that South Dakota had only one abortion provider in the entire state and that requiring that doctor to make the required telephone calls would take him seven hours per week, thereby increasing the cost of each abortion by sixty dollars.[247] The court made factual findings that South Dakota's poverty rate exceeded the national average and that seventeen percent of patients traveled 300 miles or more each way to reach an abortion provider.[248] However, the court did not evaluate the impact that this cost increase would have on teenagers, poor women, or those who lived long distances from South Dakota's sole abortion provider. Instead, the court seemed to assume that the cost increase—which it apparently viewed as modest or capable of being reduced[249]—would affect all women equally, ignoring the real differences in the lives and vulnerability of middle- and upper-class women as compared to low-income women, teenagers, domestic violence survivors, and others disparately affected by the cost increase.[250]

In *Cincinnati Women's Services v. Taft*,[251] the court considered evidence of an even larger projected increase in the cost of an abortion, which resulted from Ohio's mandatory waiting period; it found that implementation of Ohio's law "would increase the cost of an abortion by about $100," which would represent

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245. *See, e.g.*, Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 533 (8th Cir. 1994); Planned Parenthood, Sioux Falls Clinic v. Miller, 860 F. Supp. 1409, 1420-21 (D.S.D. 1994), *aff'd*, 63 F.3d 1452 (8th Cir. 1995), *cert. denied*, Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174 (1996). Six states require that state-mandated information be delivered in person to the woman, while others allow the required information to be provided by other means, including telephone, mail or fax, rather than in person. *See* GUTTMACHER INST., STATE POLICIES IN BRIEF: MANDATORY COUNSELING AND WAITING PERIODS FOR ABORTION 1-2 (2006), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

246. *Miller*, 860 F. Supp. at 1420-21.

247. *Id.* at 1414, 1420.

248. *Id.* at 1414.

249. The court seemed to discount the likelihood of an increase in the cost of abortion services, conjecturing that the doctor "personally would not necessarily have to contact all of his patients" because South Dakota allows for the referring physician to give the woman this information. *Id.* at 1420. However, the court made no findings as to how many women are actually referred by another doctor to South Dakota's abortion provider or how much the involvement of referring physicians would affect the projected cost increase.

250. In affirming the district court, as in *Fargo v. Schafer*, the Court of Appeals for the Eighth Circuit again relied heavily on the similarities between the South Dakota provision and both the Pennsylvania provisions at issue in *Casey* and the North Dakota provisions upheld in its *Schafer* opinion. *See Miller*, 63 F.3d at 1467.

251. No. 1:98-CV-289, 2005 U.S. Dist LEXIS 23015 (S.D. Ohio Sept. 8, 2005).

a twenty-five percent increase over the current cost of the procedure.[252] In concluding that this substantial cost increase did not amount to an undue burden, as in *Miller*, the court engaged in no analysis of the actual impact of this substantial increase on teenagers, poor women, and other vulnerable Ohio women. Rather, citing *Casey*, Justice O'Connor's dissenting opinion in *Akron*, and lower court decisions including *Miller*, the court summarily concluded that the hundred dollar cost increase "does not create an undue burden on the right to obtain an abortion."[253]

The *Taft* and *Miller* courts both misapplied *Casey* in their treatment of cost increases. In its analysis of both the Pennsylvania waiting period and recordkeeping provisions, the *Casey* joint opinion acknowledges that increases in the cost of abortion services that result from abortion laws can amount to an undue burden if they impose substantial obstacles on women's access to abortion.[254] Although *Casey* found that the Pennsylvania provisions did not amount to an undue burden, it did so based on a record that did not contain specific fact-findings documenting the kind of cost increases found in either *Taft* or *Miller*.[255] Moreover, under *Casey*, cost increases must be carefully assessed based on the empirical record before the court to determine if they amount to a substantial obstacle from the perspective of the women and girls actually affected and taking into account the context of poverty and other real life circumstances in which the increases occur. Indeed, lower courts' failure to assess the burdens posed by abortion restrictions from this contextualized perspective inevitably leads many of them to minimize the effect of cost increases. As Professors Estrich and Sullivan argued with respect to Justice O'Connor's initial formulation of the undue burden test:

> Because Justice O'Connor's test is based on the obstacle *to* the woman making the abortion decision, the only appropriate perspective for assessing the burden is that woman's . . . . [T]he question here is not whether a judge or a legislator or the law's perennial "reasonable man" would judge an increase in cost or requirement of notification to be a

252. *Id.* at *23-24.

253. *Id.* at *33.

254. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992); *id.* at 886-87; *see also supra* notes 97-98, 107-109 and accompanying text (discussing the *Casey* joint opinion's analysis of the significance of cost increases under the undue burden standard).

255. With regard to the Pennsylvania recordkeeping and reporting requirements, the district court found that "there was no testimony which suggests that any of the plaintiff-clinics have raised the fees for an abortion because of these added expenses." *Casey*, 744 F. Supp. 1323, 1391 (E.D. Pa. 1990). With regard to Pennsylvania's forced waiting period, the district court found that in some cases, delays caused by the waiting period "will push patients into the second trimester . . . substantially increasing the cost of the procedure itself . . . ." *Id.* at 1352. The district court also found that "[i]f the physician-only disclosure requirements become law, the added costs incurred by abortion providers will be imposed upon the women seeking abortions." *Id.* at 1353. The district court made no other specific factual findings regarding price increases in the cost of the abortion procedure resulting from the implementation of the waiting period and counseling provisions.

> "drastic limit." The question is whether a pregnant woman, or girl, would.
>
> It is not simply a matter of a man's perspective versus a woman's or, all too often, a girl's. Unwanted pregnancies strike harder at the poor and the young than at comfortable adults. Inadequate health care, incomplete birth control information, and violence and abuse, are far more common realities for poor and young women than for middle class adults. Moreover, while a $50 difference in cost may appear modest to most members of the Supreme Court, whose families are insured in any event, it is a lifetime's savings for a teenage girl. To forget her perspective could, quite literally, cost her life.[256]

Moreover, the lower courts' tendency to examine each restriction individually has minimized their impression of the actual impact of the restrictions on real women. As commentators have recognized, "restrictions that, considered one by one by a court, may not appear undue are not experienced that way by a woman seeking an abortion."[257] Rather, women often experience the cost increases and delays caused by mandatory waiting periods and counseling provisions in conjunction with a raft of other restrictions that limit access to abortion. Thus, as Walter Dellinger and Gene Sperling have argued, it is essential that courts develop a mechanism for assessing "how a given regulation *incrementally* adds to the cumulative burden" on the right to abortion.[258] Ignoring these cumulative burdens effectively "allow[s] a state to pile on 'reasonable regulation' after 'reasonable regulation' until a woman seeking an abortion first [has] to conquer a multi-faceted obstacle course."[259]

Finally, in one especially noteworthy instance, a challenge to a waiting period was successful at the trial level and then reversed on appeal. The case, *A Woman's Choice-East Side Women's Clinic v. Newman*,[260] stands out because of both the district court's thorough evaluation of the factual record and the heavy burden of proof that the Court of Appeals for the Seventh Circuit placed on plaintiffs, while giving no deference to the factual inferences drawn by the district court. In *Newman*, the plaintiffs challenged an Indiana law that required women to obtain state-mandated information *in person* eighteen hours in advance of their abortions. The trial record contained evidence, unavailable in *Casey*, of what had actually occurred in two other states—Mississippi and

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256. Estrich & Sullivan, *supra* note 30, at 136-37 (citation omitted); *see also* TRIBE, *supra* note 33, at 250 ("[U]nless the 'undue burden' test is applied with sensitivity to the circumstances of actual women in the real world, many burdens that from an Olympian judicial perspective might appear to be molehills are in fact massive obstacles to choice."); Dellinger & Sperling, *supra* note 35, at 99 (arguing that under undue burden analysis "the Court bears a strong responsibility to avoid purely theoretical judgments and instead to make a practical inquiry about whether abortion regulations operate, alone or together, as a significant burden").

257. Estrich & Sullivan, *supra* note 30, at 137.

258. Dellinger & Sperling, *supra* note 35, at 100.

259. *Id.*

260. 132 F. Supp. 2d 1150 (S.D. Ind. 2001), *rev'd*, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003).

Utah—when women were forced as a result of this requirement to make two trips to the clinic.[261] Because the Indiana law had been permitted to take effect subject to a preliminary injunction enjoining the requirement that the information be delivered to the woman in person,[262] the record also contained evidence of the mandated information's lack of persuasive effect as well as similar evidence from other states.[263]

In vivid contrast to the cursory analysis undertaken by other trial courts, the *Newman* district court engaged in a careful evaluation of the factual record to determine whether the in-person requirement unduly burdened those Indiana women affected by it. The court emphasized at the outset that *Casey* and lower court rulings from other states did not "control the validity of Indiana's law" because "different results may occur either because new evidence is presented regarding the actual effects of such laws, or perhaps because of demographic or geographic factors unique to a particular state."[264] After a thorough analysis of the record evidence and careful consideration of the objections to the validity of this evidence, the court concluded that Indiana's in-person requirement posed an undue burden because it would likely reduce by ten to thirteen percent the number of abortions performed in Indiana and significantly increase both the number of second-trimester abortions and the number of Indiana women traveling to other states to have abortions.[265] This effect would result not from the persuasive effects of the information provided but from "the substantial obstacles the law creates for a substantial fraction of [Indiana] women."[266] Specifically, the court found that, after the implementation of similar laws, the number of abortions in Mississippi dropped by approximately ten to thirteen percent and Utah showed similar decreases.[267] Based on the expert testimony in the case, the court found that the "results in Mississippi provide[d] a reasonable

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261. This evidence included a peer-reviewed Mississippi study, published in the *Journal of the American Medical Association*, which studied the effects of Mississippi's 1992 requirement that women receive state-mandated information in person and then wait at least twenty-four hours before the abortion procedure. *See* Theodore Joyce, Stanley K. Henshaw & Julia D. Skatrud, *The Impact of Mississippi's Mandatory Delay Law on Abortions and Births*, 278 J. AM. MED. ASS'N 653 (1997). The study compared abortion rates in the year before and after the Mississippi law went into effect and found that the total rate of abortions for Mississippi residents decreased by approximately 16%; the proportion of Mississippi residents traveling to other states to obtain abortions increased by 37%; and the proportion of second-trimester abortions among all Mississippi women obtaining abortions increased by 40%. *Newman*, 132 F. Supp. 2d at 1161-62. The record also contained extensive evidence of the effects of Utah's in-person counseling and twenty-four-hour delay requirements, which took effect in 1996. *Id.* at 1172. This evidence showed that the rate of abortions per one thousand women declined in Utah by 9.3% from 1995 to 1997. *Id.*

262. *See* A Woman's Choice-E. Side Women's Clinic v. Newman, 904 F. Supp. 1434 (S.D. Ind. 1995) (granting a preliminary injunction); A Woman's Choice-E. Side Women's Clinic v. Newman, 980 F. Supp. 962 (S.D. Ind. 1997) (modifying a preliminary injunction to allow the informed consent provision to take effect and directing that the mandatory information can be provided by telephone).

263. *See infra* note 269 and accompanying text.

264. *Newman*, 132 F. Supp. 2d at 1157.

265. *Id.* at 1175.

266. *Id.*

267. *Id.* at 1173.

basis for predicting estimated results in Indiana."[268] According to the court, the evidence showed that implementation of Indiana's law without its in-person requirement demonstrated that the information provided to women had no persuasive effect at all.[269]

In a split decision reversing the district court, the Court of Appeals for the Seventh Circuit emphasized throughout its opinion that "the pre-enforcement nature of this suit" placed a heavy burden on plaintiffs to show why it should "depart from the holding of *Casey* that an informed consent law is valid even when compliance entails two visits to the medical provider."[270] The court of appeals found that the district court had improperly relied on evidence from states other than Indiana in finding that the undue burden standard had been met.

> Although *Salerno* does not foreclose all pre-enforcement challenges to abortion laws, it is an abuse of discretion for a district judge to issue a pre-enforcement injunction while the effects of the law (and reasons for those effects) are *open to debate*. What happened in Mississippi and Utah does not imply that the effects in Indiana *are bound to be* unconstitutional, so Indiana (like Pennsylvania and Wisconsin) is entitled to put its law into effect and have that law judged by its own consequences.[271]

"Indiana," the court of appeals insisted, "is entitled to an opportunity to have its law evaluated in light of experience in *Indiana*."[272]

While admitting that it had found no clear error in any of the district court's fact-findings,[273] the court of appeals repeatedly questioned the

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268. *Id.* at 1173-74.

269. *Id.* at 1175. Indeed, the district court noted that the record contained testimony indicating that the state-scripted information encouraged some women to obtain abortions. *Id.* (noting that "a witness from Planned Parenthood showed that giving the information over the telephone caused an *increase* in the 'show rate' for his organization's clinics, thus indicating the startling result that the state-mandated information tends to persuade women to have *more* abortions than they otherwise would"). The district court found that the presence of this concrete evidence of the lack of any persuasive effect of the Indiana law distinguished the record in *Newman* from the record in *Karlin v. Foust*, 975 F. Supp. 1177 (W.D. Wisc. 1997), *aff'd in part, rev'd in part*, 188 F.3d 446 (7th Cir. 1999); *see Newman*, 132 F. Supp. 2d. at 1177-78. The plaintiffs in *Karlin*, a challenge to Wisconsin's mandatory waiting period and informed consent law, also relied on the Mississippi study. In *Karlin*, the District Court found that the Mississippi study failed to prove that the drop in abortions in Mississippi was attributable to the unconstitutional, rather than the persuasive, effects of the Mississippi law. *See Karlin*, 975 F. Supp. at 1217-18; *see also Karlin*, 188 F.3d at 487-88 (noting that the "most significant shortcoming" in the Mississippi study was its failure to control for persuasive effect); Eubanks v. Schmidt, 126 F. Supp. 2d 451, 457 (W.D. Ky. 2000) (finding that the Mississippi study did not prove why "some women who are forced to wait twenty-four hours ultimately [do] not have an abortion").

270. *See* A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 690-92 (7th Cir. 2002). Judge Easterbrook authored the opinion for the court, *id.* at 684-93, Judge Coffey wrote a lengthy concurring opinion, *id.* at 693-704, and Judge Wood dissented, *id.* at 704-17. The court of appeals subsequently denied rehearing en banc in a 5-5 vote. A Woman's Choice-E. Side Women's Clinic v. Newman, No. 01-217, 2002 U.S. App. LEXIS 22601 (7th Cir. Oct. 28, 2002).

271. *Newman*, 305 F.3d at 693 (first emphasis added).

272. *Id.* at 692.

inferences drawn from the facts by the district court and substituted its own inferences.[274] The appeals court, for example, rejected the district court's inference that the effects observed in Mississippi and Utah were likely to occur in Indiana and offered its own alternative explanation drawn not from record evidence but from pure speculation:

> *Maybe* . . . Indiana *differs* from Mississippi and Utah and will not experience a substantial decline [in the number of abortions], with or without multiple visits. Or *maybe* what it shows is that presenting the information in person is critical to its persuasive effect . . . . [T]he fact that Indiana has been blocked from enforcing its laws as written means that the record does not contain evidence needed for accurate assessment of that statute's effects.[275]

The court of appeals' opinion in *Newman* is troubling in several respects. The court misapplied *Casey* by placing a virtually insurmountable burden of proof on plaintiffs in a pre-enforcement facial challenge. While ostensibly rejecting *Salerno*,[276] the court demanded airtight proof—or certainly proof not "open to debate"—that the Indiana law was "bound to" affect Indiana women in an unconstitutional manner.[277] But, in striking down the Pennsylvania spousal notification provision, the *Casey* plurality did not require a finding that the unconstitutional effects of that statute were inevitable and indisputable; rather the joint opinion found, based on inferences drawn from the factual findings of the district court and published empirical studies of domestic violence, that forced notification was "likely to prevent a significant number of women from obtaining an abortion."[278] Moreover, in requiring proof that is not "open to debate" the court of appeals rejected the very evidence that would best prove the likely unconstitutional effects of Indiana's law in a pre-enforcement challenge—i.e., evidence from other states that have already implemented an in-person counseling requirement. Predictions about how women of Indiana

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273. *Id.* at 689 ("[W]e cannot say that the district court's findings are clearly erroneous. The studies' conclusions were hotly debated on both medical and statistical grounds, but the district judge dealt responsibly with these arguments pro and con, and his findings cannot be upset.").

274. *See id.* at 689-91. The majority reasoned that the question of "what is likely to happen in Indiana" is an "admixture of fact and law" and therefore could be reviewed "without deference." *Id.* at 689.

275. *Id.* at 690 (first and third emphases added).

276. *Id.* at 687 ("Given the incompatibility between *Salerno*'s language and *Stenberg*'s holding, it is the language of *Salerno* that must give way.").

277. *Id.* at 693. Indeed, Judge Wood believed that the standard applied by the majority was, in fact, the *Salerno* standard or "something very close to it" because "[i]n essence, it holds that a state statute like the one before us now would be unconstitutional only if there was 'no set of circumstances' under which it was valid—by which it seems to mean that not a single woman in Indiana would find the law's burdens tolerable." *Id.* at 707 (Wood, J., dissenting).

278. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893 (1992). As Judge Wood argued, "*Casey*'s discussion of the spousal notification rule makes it clear that evidence on undue burden does not have to meet some heightened standard of perfection. To the contrary, the Court there relied on 'limited research that has been conducted . . . [on notifying one's husband about abortion] although involving samples too small to be representative.'" *Newman*, 305 F.3d at 712 (Wood, J., dissenting) (quoting *Casey*, 505 U.S. at 892).

will respond to the two-visit requirement will, of course, inevitably be "open to debate," but it is the job of the trial court to assess the evidence in the record and draw reasonable inferences about how Indiana women are likely to respond.[279] As Judge Wood emphasized in her dissent, the court of appeals overstepped its bounds by riding roughshod over the reasonable inferences drawn by the district court and "substitut[ing] its own factual assumptions for evidence that is in the record."[280]

3. *Challenges to Laws Regulating the Medical Practice of Abortion Providers*

Other post-*Casey* undue burden challenges have focused on state laws that regulate the medical practices of abortion providers by laying down a variety of requirements not imposed on comparable medical providers.[281] These challenges have met with success—especially in the trial courts—more often than challenges to waiting periods and other provisions similar to those upheld in *Casey*.[282] Some courts have found that these regulations do not reasonably relate to the state's purported health interests;[283] others have found that they

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279. *Id.* at 717. As Judge Wood noted, the Supreme Court has held that reviewing courts owe deference to the district courts' findings of "historical fact" even in constitutional cases. *Id.* at 705-06 (Wood, J., dissenting) (citing Ornelas v. United States, 517 U.S. 690, 699 (1996) ("[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.")); *see also* Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 858 (1982) (reversing because "[t]he Court of Appeals erred in setting aside findings of fact that were not clearly erroneous"); *id.* at 857-58 ("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently. . . .") (quotation omitted).

280. *Newman*, 305 F.3d at 717 (Wood, J., dissenting).

281. These laws impose a variety of special requirements on abortion providers, for example: requiring that they be licensed; authorizing state health officials to search their offices and allowing inspection of patients' medical records; imposing requirements as to both training and qualifications of staff and the design and function of the physical facility; and requiring testing of patients and employees. *See* Ctr. for Reprod. Rights, *Briefing Paper: Targeted Regulation of Abortion Providers: Avoiding the "TRAP"* 2-4 (Aug. 2003), *available at* http://www.reproductiverights.org/pdf/pub_bp_avoidingthetrap.pdf. Unlike biased counseling provisions, mandatory waiting periods, parental involvement laws, and other restrictions that seek to advance the state's interest in promoting fetal life by influencing the woman's decision-making process, these laws regulate the medical practices of providers in a purported effort to safeguard the pregnant woman's health. *Id.* at 2. Challenges to these laws based on the right to privacy have sought to demonstrate that they are, in fact, unnecessary and extremely burdensome, "rais[ing] the cost of providing and obtaining abortions, and thereby caus[ing] some women to delay or even forego desired abortions." *Id.* at 1. These laws have also been challenged on a variety of other federal and state constitutional law grounds, including procedural due process, equal protection, informational privacy, and vagueness. *Id.* at 5-7.

282. *See, e.g.*, Tucson Women's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004); Springfield Healthcare Ctr. v. Nixon, No. 05-4296-CV-C-NKL (W.D. Mo. Sept. 16, 2005) (granting a temporary restraining order), *available at* http://www.reproductiverights.org/crt_ab_trap.html; Jackson Women's Health Org. v. Amy, 330 F. Supp. 2d 820 (S.D. Miss. 2004); Reprod. Servs. v. Keating, 1998 U.S. Dist. LEXIS 23536 (N.D. Okla. Dec. 17, 1998).

283. *See, e.g.*, *Jackson Women's Health*, 330 F. Supp. 2d at 825 (finding that Mississippi's ban on second-trimester abortions by plaintiff-provider, "without reference to whether it meets the relevant health and safety criteria," does not advance "the State's professed desire to protect the health and safety

unduly burden women's access to abortion by decreasing the availability of abortion services or increasing the costs of abortion.[284]

As in the *Newman* litigation discussed above, however, some appellate courts have shown a disturbing tendency to disregard trial courts' factual findings and to impose unreasonably heavy burdens of proof on challengers. *Greenville Women's Clinic v. Bryant*,[285] for example, involved a challenge to a South Carolina law that required physicians and abortion facilities that performed more than an occasional first-trimester abortion to obtain a license to operate their office or clinic.[286] South Carolina did not generally require licensing of medical facilities.[287] For abortion providers, however, licensure was mandatory, and it was conditioned on compliance with twenty-seven pages of detailed requirements concerning the physical layout of the facility, staff qualifications, cleaning and maintenance of the clinic, requisite equipment, training of staff, and the type of medical care and tests that had to be offered to patients.[288] Following a six-day bench trial and "after spending months reviewing all aspects of this case"[289] the district court made 100 factual findings and ultimately concluded that the regulations were invalid under *Casey*.[290] First, the district court found that they did not further the state's interest in maternal health because they were "at best medically unnecessary and at worst contrary to accepted medical practice."[291] Second, the court found that the regulations were likely to have the effect of imposing an undue burden on women's access to abortion in South Carolina. In assessing the burdens posed by the regulation, the court gave great weight to evidence that the regulation would result in a substantial rise in the cost of abortion services, "at

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of women who choose abortion"); *see also Tucson Women's Clinic*, 379 F.3d at 540 ("[T]he undue burden standard is not triggered at all if a purported health regulation fails to rationally promote an interest in maternal health on its face . . . .").

284. *See, e.g.*, *Springfield Healthcare Ctr.*, No. 05-4296-CV-C-NKL at 2 (granting a temporary restraining order against a requirement that Missouri abortion providers have clinical privileges at a hospital within thirty miles of where an abortion is performed because plaintiff had "demonstrated a substantial likelihood of success on the merits of its argument that the cessation of all abortion services in Southwest Missouri imposes an undue burden on a woman's reproductive rights"); *see also Tucson Women's Clinic*, 379 F.3d at 541 ("A significant increase in the cost of abortion or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion.").

285. 66 F. Supp. 2d 691 (D.S.C. 1999), *rev'd*, 222 F.3d 157 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

286. *Id.* at 696. South Carolina had previously required licensing of only those offices and clinics where second-trimester abortions were performed. *Id.*

287. *Id.* at 697.

288. *See id.* at 698-704.

289. *Id.* at 732.

290. In addition to finding that the regulation violated the Due Process Clause of the Fourteenth Amendment, the district court also found that it violated the Fourteenth Amendment's Equal Protection Clause because it "singles out physicians and clinics where abortions are performed regularly . . . and imposes upon them requirements which are not imposed upon comparable procedures and not even upon all physicians who perform first trimester abortions." *Id.* at 737-43.

291. *Id.* at 731.

a minimum, between $30.00 and $75.00," and, in one area of the state, would "result in an increase of between $100 and $300, or result in the elimination of services altogether."[292] The court also made specific factual findings as to how price increases and elimination of services would likely affect women seeking abortions in South Carolina, concluding:

> By causing delays in the woman's financial ability to obtain an abortion, the regulation will cause the woman to undergo abortion later in the pregnancy, or forego the procedure altogether, both of which result in a higher cost and higher medical risk for the woman. The decreased availability of abortions due to closure of an abortion clinic also constitutes a substantial obstacle to women seeking abortions. And increasing the distance a woman has to travel to obtain an abortion increases the costs for the woman, again resulting in delay or the inability to obtain an abortion.[293]

In a split decision reminiscent of the Seventh Circuit's analysis in *Newman* discussed above,[294] the Court of Appeals for the Fourth Circuit reversed the district court's entry of a permanent injunction, finding that the district court had erred in its conclusions that the regulations unduly burdened women seeking abortions and that they did not rationally further the state's purported health interests. The court of appeals began its analysis by noting its deep skepticism about the validity of facial challenges to abortion laws and its reluctance to invalidate the regulation without precise evidence of its actual impact on South Carolina women:

> Because of the nature of facial challenges, [the plaintiff-providers] could not present the district court with a concrete factual circumstance . . . to which to apply the Regulation. The clinics therefore must argue about the Regulation's impact generally and prospectively, the type of action typically undertaken by legislatures, not courts. Because a trial on a facial challenge can focus only on arbitrarily selected hypotheticals to which the Regulation might apply, a court is required to speculate about the Regulation's overall effect.
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> In this case, for example, the district court was not given—and could not be given—any data from South Carolina patients about the impact that particular costs had on their decision to seek an abortion. It was given only estimates by "experts." Accordingly, the impact of the Regulation in any given situation could only have been anticipated.[295]

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292. *Id.* at 735. The district court made seven detailed factual findings on the costs to providers of complying with the regulation. *See id.* at 716-18. With regard to one provider, Dr. Lynn, the district court found that "the substantial alterations that Dr. Lynn must undertake in his practice, and the resulting extraordinary per procedure cost (even by defendants' estimate) will likely force him to cease performing abortions in his Beaufort office and, thereby, eliminate entirely the availability of abortions in this area of the state." *Id.* at 717.

293. *Id.* at 735.

294. *See supra* notes 270-280 and accompanying text.

295. Greenville Women's Clinic v. Bryant (*Greenville I*), 222 F.3d 157, 163-64 (4th Cir. 2000). The court of appeals also indicated its strong preference for the application of the *Salerno* "no set of

In rejecting the district court's findings regarding the substantial obstacles posed by the regulation, the court of appeals emphasized that the record contained no evidence of how the regulation "would actually affect any South Carolina woman's decision to seek an abortion," noting that this was "not due to a failure of proof but a problem inherent in conducting a facial challenge."[296] The court referred to the record testimony regarding cost increases as "speculative" and, in any event, under *Casey* not sufficient to meet the undue burden standard because the projected increases of twenty-three to seventy-five dollars per abortion at two clinics, while making it more "difficult" and "expensive" to obtain an abortion, did not impose an "undue burden on 'a woman's ability to make the decision to have an abortion.'"[297] As to the larger projected cost increases that would cause the clinic in Beaufort, South Carolina to shut down entirely, the court of appeals opined "no evidence suggests that women in Beaufort could not go to the clinic in Charleston, some 70 miles away."[298] Finally, the court of appeals balanced the degree of burden posed by the regulation against its value in advancing the state's asserted interest, concluding that "the increased costs claimed by the three abortion providers are particularly modest when one considers their purpose is to protect the health of women seeking abortions."[299]

The Fourth Circuit's analysis contains several serious flaws. First, in requiring that facial challengers support their claims with proof of a regulation's actual impact on women in the very state that has enacted but not implemented the regulation, the court of appeals imposed a burden that is both insurmountable and inconsistent with *Casey* and *Stenberg*. All facial challenges to abortion restrictions must necessarily be mounted on the basis of evidence of an abortion restriction's *likely* impact, because evidence of its actual impact is not available in a facial challenge. As discussed above,[300] *Casey* makes clear that the proper focus of the undue burden analysis is whether a significant

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circumstances" standard and found that the regulation would be valid under this standard. *Id.* at 165. The court also assessed the regulation under the *Casey* standard, finding that it was valid under this standard as well. *See id.*

296. *Id.* at 170. The court of appeals also rejected the district court's conclusions that the regulation departed from accepted medical practice and did not further the state's interest in maternal health because it found that some aspects of the regulation were consistent with the guidelines of national medical organizations. *Id.* at 167-70.

297. *Id.* at 170 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992)).

298. *Id.* The court took note of the district court's findings that the regulation would cause delays in women's financial ability to obtain an abortion and increase travel distances, but summarily rejected them, reiterating "again, in the context of a facial challenge and in the absence of any evidence in the record about how the cost would affect women's ability to make a decision," the plaintiffs had not demonstrated "any serious burden on a woman's ability to make an abortion decision." *Id.* at 171.

299. *Id.* at 170; *see* Women's Med. Ctr. of N.W. Houston v. Archer, 159 F. Supp. 2d 414, 451-52 (S.D. Tex. 1999), *aff'd*, 248 F.3d 411 (5th Cir. 2001) (reasoning that the constitutionality of an abortion regulation under *Casey* turns on whether "the benefits sought by the state . . . justify the increased costs that might be incurred by the physicians").

300. *See supra* notes 97, 107-09, 254-256 and accompanying text.

number of women are "*likely* to be deterred from procuring an abortion"[301] and that cost increases may constitute an undue burden if they have this effect on women.[302] In contrast, by requiring evidence of the actual impact of restrictions, the Fourth Circuit's approach effectively dooms all pre-enforcement facial challenges—a result that is plainly at odds with the *Casey* joint opinion. Second, the court of appeals erred in weighing the effects of the regulation against the state's interest in advancing maternal health and intimating that the benefits asserted by the state justified the burdens posed by the regulation. The *Casey* joint opinion holds that even where a statute furthers a legitimate interest of the state, it is unconstitutional if it imposes an undue burden on women seeking abortions.[303] Thus, a valid state interest cannot justify abortion laws that unduly burden women's ability to obtain an abortion.[304] Finally, as in *Newman*,[305] without declaring any of the district court's factual findings clearly erroneous, the court of appeals disregarded them and improperly substituted its own inferences about the likely impact of the price increases on South Carolina women. For example, it acknowledged the district court's finding that the cost increases caused by the South Carolina regulation would cause the closure of the only abortion provider in one area of the state, but discounted the finding based on pure speculation that women could easily travel seventy miles to another clinic. As Judge Hamilton noted in his dissenting opinion, this conclusion—drawn not from the evidentiary record but apparently from the personal life experience of the judges in the majority—ignores the real life challenges many South Carolina women face in accessing abortion services:

> While traveling seventy miles on secondary roads may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore . . . such is not to be so casually addressed and treated with cavil when considering the plight and effect on a woman residing in rural Beaufort County, South Carolina.[306]

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301. *Casey*, 505 U.S. at 894 (emphasis added).

302. *Id.* at 901.

303. *See supra* notes 80, 106 and accompanying text.

304. In repeatedly insisting that the South Carolina regulation must be shown to unduly burden a "woman's *decision* to seek an abortion," Greenville Women's Clinic v. Bryant (*Greenville I*), 222 F.3d 157, 170 (4th Cir. 2000), the court of appeals also seemed to narrow the right protected by the Constitution. *Casey* and *Stenberg* both reaffirm that the Constitution protects both the right to decide to choose abortion *and* the right to be free from substantial obstacles in implementing the abortion decision. Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (invalidating an abortion procedure ban in part because it "'imposes an undue burden on a woman's ability' to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself.") (quoting *Casey*, 505 U.S. at 874); *Casey*, 505 U.S. at 877 (prohibiting abortion restrictions that "plac[e] a substantial obstacle in the path of a woman's choice").

305. *See supra* notes 260-280 and accompanying text.

306. *Greenville I*, 222 F.3d at 202 (Hamilton, J., dissenting).

In contrast, the district court's findings—supported by the empirical evidence in the record and consistent with *Casey*[307]—recognized that these substantial price increases and longer travel distances would amount to a substantial obstacle by "prevent[ing] a significant number of women from obtaining an abortion or, at minimum, delay[ing] them from obtaining the abortion."[308]

The decision of the Court of Appeals for the Sixth Circuit in *Women's Medical Professional Corporation v. Baird*[309] provides another example of an appellate court reversing a trial court's findings of undue burden based on improper speculation about the impact of a regulation on women seeking abortion. *Baird*, unlike *Greenville*, involved an as-applied challenge to an Ohio licensing provision that required the plaintiff-abortion provider to have a written transfer agreement with a local hospital for transfer of patients in the event of medical complications and emergencies.[310] The abortion provider, located in Dayton, Ohio, had tried unsuccessfully to obtain such an agreement with local hospitals.[311] The district court held that applying the transfer agreement requirement to the plaintiff-provider unduly burdened women seeking abortions in the Dayton area because it would cause the provider, which served 3000 women each year, to shut down completely.[312]

In reversing the district court, the court of appeals reasoned that "while closing the Dayton clinic may be burdensome for some of its potential patients, the fact that these women may have to travel farther to obtain an abortion does not constitute a substantial obstacle."[313] The court supported its conclusion by noting that there was evidence in the record that other clinics existed in large cities in Ohio, and that the plaintiff operated a clinic "approximately forty-five to fifty-five miles from the Dayton clinic."[314] Therefore, the court concluded, "potential patients of the Dayton clinic could still obtain an abortion in Ohio and . . . within a reasonable distance from the Dayton clinic."[315]

As to the trial court's finding that 3000 women per year were served by the clinic, the court found that this fact alone "was insufficient in and of itself" to

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307. The record contained testimony, credited by the district court, "that an increase of just $25 can be expected to prevent one or two out of every 100 low-income women seeking an abortion from being able to obtain one." Greenville Women's Clinic v. Bryant, 66 F. Supp. 2d 691, 714 (D.S.C. 1999).

308. *Id.* at 718.

309. 438 F.3d 595 (6th Cir. 2006).

310. Women's Med. Prof'l Corp. v. Baird, 277 F. Supp. 2d 862, 873 (S.D. Ohio 2003), *aff'd in part, vac'd in part*, 438 F.3d 595. The district court also found that application of the transfer requirements violated plaintiffs' procedural due process rights. *Id.* at 877-79. This aspect of the trial court's holding was affirmed on appeal. 438 F.3d at 611 (holding that the failure to offer the provider a pre-deprivation hearing before closing the clinic was a violation of its procedural due process rights).

311. *Baird*, 277 F. Supp. 2d. at 873.

312. *Id.* at 877.

313. *Baird*, 438 F.3d at 605.

314. *Id.*

315. *Id.*

establish an undue burden.[316] Rather than remanding the case to the trial court for additional fact-findings on the impact of the closure on this large number of women, however, the court of appeals made its own findings. The court pointed out that "[n]inety percent of [the 3000] women come from within fifty to sixty miles of Dayton," and "there is no evidence suggesting that a large fraction of these women would be unable to travel to other Ohio cities for an abortion."[317] As for the other ten percent of patients that came to the Dayton clinic "from across Ohio and from other states," the court of appeals summarily concluded: "Presumably, the closing of the Dayton clinic would not impose an undue burden on this population because they are already traveling to seek abortion services."[318]

The court used a similar analysis to reject the provider's argument, unaddressed by the trial court, that its closure unduly burdened women seeking late second-trimester abortion because it was "the only clinic in southern Ohio offering abortions after the eighteenth or nineteenth week of pregnancy."[319] In rejecting this argument, the court of appeals again resorted to speculation, finding that no undue burden existed because women seeking later abortions "could travel to Cleveland to obtain such an abortion, as clinics in that city provide similar services to the Dayton clinic."[320]

Given the critical role of fact-findings in the determination of whether a regulation constitutes an undue burden, the Sixth Circuit's approach of essentially making its own findings—based not on empirical evidence, but on pure speculation—undermines the *Casey* standard. If the district court had not adequately supported with factual findings its conclusion that an undue burden existed, a fairer approach, and one more consistent with the traditional role of an appellate court, would have been for the court of appeals to remand the case to the district court. As the trier of fact, the district court could then assess such factors as the availability of public transportation from Dayton to other cities in Ohio, the cost of increased travel, the ability of other clinics in Ohio to absorb the Dayton clinic's patients, and the ability of low-income and young women to bear these cost increases.[321] It is essential to remove these considerations from the realm of speculation and ground them, instead, in the empirical record if the

316. *Id.*

317. *Id.*

318. *Id.* at 605 n.6.

319. *Id.* at 606.

320. *Id. But see* The Women's Ctr. v. Tenn. Dep't of Health, No. 3:99-0465, 2000 U.S. Dist. LEXIS 20198 at *57 n.18 (M.D. Tenn. Apr. 14, 2000) (finding that the plaintiff-providers had not established that the Tennessee certificate of need requirement posed an undue burden on women seeking abortions, but noting that had facts been presented that established that the plaintiffs treated primarily indigent patients, that clinics in surrounding areas could not provide abortions to the women affected, or that plaintiffs were the only clinic in their region of the state, "analysis might have been different as well").

321. The opinion of the district court does not indicate whether the plaintiffs had, in fact, supported their challenge with this kind of evidence.

undue burden analysis is to meaningfully assess whether such obstacles, considered from the woman's perspective, are substantial ones.

4. *Challenges to Abortion Procedure Bans*

Even prior to the Supreme Court's ruling in *Stenberg v. Carhart*,[322] most state abortion procedure bans were held unconstitutional under *Casey*.[323] Typically, these rulings have turned on the determination that the procedure ban unduly burdens the abortion right by prohibiting common methods of pre-viability abortion, is unconstitutionally vague, and/or makes no exception for women whose health necessitates the banned procedure.[324]

An interesting deviation from this general pattern is the ruling by the Court of Appeals for the Seventh Circuit in *Hope Clinic v. Ryan*.[325] In *Hope Clinic*,

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322. *See supra* Part III.B.

323. Of the thirty-one states that have enacted abortion procedure bans, twenty-two have been the subject of legal challenges. *See* Ctr. for Reprod. Rights, *Briefing Paper*, *supra* note 14.

324. *See, e.g.*, Rhode Island Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288 (D.R.I. 1999) (granting a permanent injunction based on vagueness, lack of health exception, and undue burden), *aff'd*, 239 F.3d 104 (1st Cir. 2001) (affirming *per curiam* based on *Stenberg*); Causeway Med. Suite v. Foster, 43 F. Supp. 2d 604 (E.D. La. 1999) (granting a permanent injunction based on findings of an unduly burdensome purpose and effect, and lack of maternal health exception), *aff'd*, 221 F.3d 811 (5th Cir. 2000) (affirming in light of *Stenberg*); Little Rock Family Planning Servs. v. Jegley, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325 (E.D. Ark. Nov. 13, 1998) (granting a preliminary injunction and declaring a procedure ban unconstitutional because of undue burden, vagueness, and absence of health exception), *aff'd*, 192 F.3d 794 (8th Cir. 1999) (basing a holding of unconstitutionality on undue burden grounds); A Choice for Women v. Butterworth, 54 F. Supp. 2d 1148 (S.D. Fla. 1998) (issuing a permanent injunction against a Florida abortion procedure ban on grounds of undue burden, vagueness, and lack of health exception); Planned Parenthood of Cent. N.J. v. Verniero, 41 F. Supp. 2d 478 (D.N.J. 1998) (holding a procedure ban unconstitutional on grounds that it was void for vagueness, lacked a health exception, and was unduly burdensome), *aff'd sub nom.* Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127 (3d Cir. 2000) (adopting district court's analysis, in a decision drafted but not released prior to *Stenberg* decision); Planned Parenthood of Greater Iowa v. Miller, 1 F. Supp. 2d 958 (S.D. Iowa) (granting a preliminary injunction based on vagueness and undue burden), *aff'd*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998) (granting the plaintiffs' motion for summary judgment on the same grounds), *aff'd*, 195 F.3d 386 (8th Cir. 1999) (affirming the judgment based on the Eighth Circuit's *Stenberg* ruling), *cert. denied*, 530 U.S. 1274 (2000); Planned Parenthood of S. Ariz. v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997) (holding an Arizona procedure ban unconstitutional on grounds of undue burden, vagueness, and failure to contain a health exception); Evans v. Kelley, 977 F. Supp. 1283 (E.D. Mich. 1997) (granting a permanent injunction based on findings of undue burden and unconstitutional vagueness); Women's Med. Prof'l Corp. v. Voinovich, 911 F. Supp. 1051 (S.D. Ohio 1995) (enjoining a statute based on *Casey* and *Danforth*), *aff'd*, 130 F.3d 187 (6th Cir. 1997) (affirming the district court based on *Casey* undue burden standard), *cert. denied*, 523 U.S. 1036 (1998). *But see* Hope Clinic v. Ryan, 195 F.3d 857, 874 (7th Cir. 1999) (holding that a procedure ban could be applied constitutionally but affirming a permanent injunction pending resolution of state court questions), *vacated*, 530 U.S. 1271 (2000) (following *Stenberg*).

325. 195 F.3d 857, *vacated*, 530 U.S. 1271 (2000), *permanent injunction entered*, 249 F.3d 603 (7th Cir. 2001) (per curiam opinion holding statute unconstitutional under *Stenberg*). *Midtown Hospital v. Miller*, 36 F. Supp. 2d 1360 (N.D. Ga. 1997), was also an exception to the general rule that, even before *Stenberg*, procedure bans were held unconstitutional. In *Midtown Hospital*, the parties entered into a consent agreement limiting Georgia's enforcement of its abortion procedure ban to intact D & E procedures performed post-viability. In approving the consent agreement and denying the plaintiff's motion for a temporary restraining order, the court noted that no third-trimester abortion procedures had

the Seventh Circuit reviewed a district court opinion granting a permanent injunction under *Casey*.[326] The district court had held that the law had the impermissibly burdensome effect of banning common and safe pre-viability abortion procedures.[327] In addition to finding that the law would chill physicians' willingness to provide abortion care by criminalizing "virtually every abortion procedure, except hysterotomy and hysterectomy,"[328] the court also determined that it violated the effects prong of *Casey* by increasing the cost and health risk to women.[329] While the district court did not provide a detailed purpose prong analysis, it suggested that the legislature may have acted with an improper purpose in that it intentionally excluded a health exception, valuing fetal survival over women's health.[330]

In a consolidated appeal, the Court of Appeals for the Seventh Circuit, sitting en banc, undertook to construe the Illinois statute and a similar Wisconsin statute[331] to avoid a holding of unconstitutionality.[332] The appeals court acknowledged unapologetically that it was proposing a substantial alteration in the text of the challenged provision: "if this approach would nonetheless be an example of brute force used to save a statute—well, courts do it all the time."[333] In another startling example of the super-proof that some courts have demanded of plaintiffs in undue burden challenges, the appeals court noted that plaintiffs could not point to one woman who had been injured or denied an abortion because of a partial-birth abortion law in any state[334]—proof that would have been challenging to produce in any event, and particularly so when nearly every procedure ban had been enjoined prior to implementation. Reasoning that, "[s]o long as the law does not harm women's legitimate interests, the fact that the law's effects are small and justified by moral rather than utilitarian considerations does not spell unconstitutionality,"[335] the Seventh Circuit upheld the statutes' constitutionality

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been performed in Georgia in the last two years, and that physicians could avoid liability under the statute by causing fetal demise prior to undertaking the banned procedure. *Id.* at 1362-63.

326. Hope Clinic v. Ryan, 995 F. Supp. 847 (D. Ill. 1998).

327. *Id.*

328. *Id.* at 857.

329. *Id.* at 858-59.

330. *Id.* at 860-61.

331. WIS. STAT. ANN. § 940.16 (2006) (providing for life imprisonment upon conviction of offense of performing "partial birth abortion"). The constitutionality of this statute was challenged in *Planned Parenthood of Wisconsin v. Doyle*, 9 F. Supp. 2d 1033 (W.D. Wis.) (denying preliminary injunction), *rev'd*, 162 F.3d 463 (7th Cir. 1998) (granting a preliminary injunction against the Wisconsin procedure ban because it applied to pre-viability abortions, contained no health exception, and was unconstitutionally vague).

332. Hope Clinic v. Ryan, 195 F.3d 857, 865-68 (7th Cir. 1999) (discussing various scenarios for the constitutional construction of the challenged statutes, including conforming the statutory definition of the banned procedures to the medical definition of D & X, using *scienter* requirements to limit prosecutions to cases in which the defendant intends to perform all steps of a D & X procedure, and using a common law approach to "fashion [the] outer boundaries" of the offense).

333. *Id.* at 865.

334. *Id.* at 874.

335. *Id.* at 875.

in some applications. However, it left in place the injunctions preventing the implementation of the ban against any procedure other than the D & X method until statutory construction questions could be resolved by the state courts.

In a stinging dissent on behalf of four judges, Judge Posner argued that the evidence indicated that the statute banned a wide range of common procedures and would constitute an undue burden even if it could be construed to apply only to the D & X procedure.[336] Furthermore, even if expert medical opinion were divided on the question of whether the banned procedures are preferable for some women, such evidence could still support a finding of undue burden: "[T]he Wisconsin and Illinois legislatures are not entitled to ban an abortion procedure that the medical community believes may be preferable from a medical standpoint for some women, simply because a marginally respectable expert . . . thinks that the set of women for whom the procedure is preferable is actually zero."[337] Judge Posner detected an improper purpose both in the statute's language, which used emotionally laden terminology designed to discourage abortion, and in the statute's supporters, who failed to articulate a credible purpose of the restriction other than to stigmatize abortion generally: "[I]f a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."[338]

Despite these outlier cases, however, since *Stenberg* clarified that procedure bans that sweep too broadly or lack an explicit health exception are unconstitutional under *Casey*,[339] courts have almost uniformly struck down state abortion procedure bans.[340] Interestingly, these cases do not generally turn on or even undertake a purpose analysis,[341] even when the challenged statute was enacted post-*Stenberg* seemingly in outright defiance of the holding of that case.[342] These decisions, often per curiam, respond to the clear guidance provided by *Stenberg*'s per se rule that the lack of an explicit health exception renders an abortion procedure ban unconstitutional, and sometimes also

336. *Id.* at 885 (Posner, J., dissenting).

337. *Id.*

338. *Id.* at 881 (Posner, J., dissenting). This suggestion of improper purpose was echoed in Justice Ginsburg's concurrence in *Stenberg*. *See supra* note 158.

339. *See supra* Part III.B.

340. *See, e.g.*, Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 325 F. Supp. 2d 991 (W.D. Mo. 2004) (permanently enjoining procedure ban based on *Stenberg*), *aff'd*, 429 F.3d 803 (8th Cir. 2005) (affirming on health exception grounds); Richmond Med. Ctr. for Women v. Hicks, 301 F. Supp. 2d 499 (E.D. Va. 2004) (granting a permanent injunction against a 2003 ban on "partial birth infanticide," VA. CODE ANN. § 18.2-71.1 (2006), on grounds that the statute lacked a health exception, was vague, and imposed an unduly burdensome effect on pre-viability abortions), *aff'd*, 409 F.3d 619 (4th Cir. 2005) (affirming the district court under *Stenberg* based on absence of health exception), *pet. for cert. filed*, 74 U.S.L.W. 3352 (U.S. Dec. 1, 2005) (No. 05-730).

341. *See* discussion *infra* Part IV.B.

342. *See, e.g.*, *Hicks*, 301 F. Supp. 2d 499; *Nixon*, 325 F. Supp. 2d 991 (holding a post-*Stenberg* procedure ban, MO. REV. STAT. § 565.300 (2004), unconstitutional because it lacked a health exception).

undertake an undue burden analysis that focuses on the unconstitutional effect that a ban on most second-trimester abortion methods would have on women's access to abortion.[343]

The consistency achieved in this body of case law is due to the clarity of the *Stenberg* majority opinion. With three ongoing challenges to the federal Abortion Procedure Ban[344] likely to produce additional guidance from the Supreme Court on the constitutionality of procedure bans, it is essential that the Court reaffirm the primacy of women's health central to the Court's *Stenberg* ruling and to those earlier cases from which *Stenberg* proceeded: *Casey*, *Danforth*, and *Roe*.

B. Implementation of the Purpose Prong

Given the heavy burden of proving in a facial challenge that abortion restrictions will have an actual impermissible effect on women's access to abortion, the purpose prong of *Casey*'s undue burden test becomes especially useful, because evidence of improper purpose is likely to be available pre-implementation, whereas proof of impermissible effect might not be. Yet, just as lower federal courts have often failed to conduct a contextualized, fact-sensitive analysis of the specific effects of an abortion regulation on the affected classes of women, so too have they often failed to look searchingly at the legislative purpose motivating the enactment of challenged restrictions. Similarly, some appellate courts have disregarded district courts' fact-finding as regards legislative purpose, substituting their own presumptions and drawing their own inferences in the absence of any finding of clear error, thus repeating the methodological mistake of imposing *Casey*'s result instead of applying *Casey*'s standard.

Since the Court's perplexing suggestion in *Mazurek* that an impermissible legislative purpose to pose a substantial obstacle to abortion might only be inferred if the intended obstruction has actually been created,[345] the Supreme Court has offered little additional guidance as to how to approach *Casey*'s purpose prong.[346] Lower courts have tended to omit discussion of the purpose

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343. In contrast, in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003), the Court of Appeals for the Sixth Circuit lifted a district court injunction entered post-*Stenberg* that had enjoined Ohio's abortion procedure ban on the ground that it lacked an adequate health exception. In permitting the ban to take effect, the appeals court distinguished *Stenberg* by pointing to the Ohio statute's careful description of the restricted procedure, to the statute's specific exclusion of the D & E procedure, and to the presence of a health exception.

344. *See supra* note 176 and accompanying text.

345. *See supra* Part III.A.

346. *See* Amalia W. Jorns, Note, *Challenging Warrantless Inspections of Abortion Providers: A New Constitutional Strategy*, 105 COLUM. L. REV. 1563, 1586 (2005) (concluding that the Supreme Court has largely ignored the purpose prong of the undue burden test, and noting Justice Thomas's comment in dissenting in *Stenberg v. Carhart*, 530 U.S. 914, 1008 n.19 (2000) (Thomas, J., dissenting),

prong or to conflate it with the effects prong.[347] The lower court cases that have addressed the purpose prong as an independent constitutional basis for invalidating abortion restrictions have tended to define the test negatively, describing the type of evidence that is insufficient to establish improper purpose but never indicating what evidence, short of a defendant's outright admission on the record, might suffice.[348] Absent such an admission, lower courts have been extremely reluctant to apply the purpose prong to invalidate abortion restrictions.[349] In the words of one district court, "[a]fter [*Mazurek*], the impermissible purpose prong of the undue burden test appears almost impossible to prove . . . ."[350]

The lower courts' reluctance to engage in meaningful purpose prong analysis is at least partly traceable to the *Casey* Court's reticence on the subject. For example, in *Karlin v. Foust*, where plaintiffs produced detailed evidence of improper purpose focusing on the statute's legislative history, the district court reluctantly rejected the purpose prong challenge, relying principally not on the recently decided *Mazurek*, but on *Casey*.[351] In *Karlin*, a group of women's health care providers challenged Wisconsin's restrictive abortion statute which was based loosely on the Pennsylvania Abortion Control Act.[352] It contained a twenty-four-hour waiting period and biased counseling provisions even more extensive than those in *Casey*,[353] though certain provisions also contained

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that the Court would require "persuasive proof" before concluding that a legislature had acted with an unconstitutional intent).

347. *See supra* notes 341-342 and accompanying text.

348. Defendant-Appellees in *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), *cert. denied*, *Leavitt v. Jane L.*, 520 U.S. 1274 (1997), made just such an admission. *Jane L.* concerned a Utah statute sharply restricting abortions after twenty weeks' gestation. The court of appeals struck down the statute, concluding that the legislature had acted with an improper motive by drafting a statute in direct conflict with Supreme Court precedent in order to provoke a challenge to *Roe*, as evidenced by the legislature's creation of an abortion litigation trust account. During litigation, the state conceded that its purpose was to restrict abortions, raising no defense that any member of the Utah legislature had acted with a permissible purpose. *See also Karlin*, 188 F.3d at 493 (purpose prong "challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose.").

349. Our research revealed only three cases striking down an abortion restriction on the basis of improper purpose: *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999) (terminating tort liability for abortion providers), *rev'd on other grounds*, 244 F.3d 405 (5th Cir. 2001) (en banc); *Planned Parenthood of Greater Iowa v. Atchison*, 126 F.3d 1042 (8th Cir. 1997) (removing a certificate of need requirement); and *Jane L.*, 102 F.3d 1112 (eliminating post-20-week abortion restrictions).

350. Karlin v. Foust, 975 F. Supp. 1177, 1210 (W.D. Wis. 1997), *aff'd*, 188 F.3d 446 (7th Cir. 1999).

351. *Karlin*, 975 F. Supp. 1177.

352. *Id.*; Assembly Bill 441, codified at WIS. STAT. ¶ 253.10 (2005).

353. Among the more onerous aspects of the Wisconsin statute were: a requirement that the mandated counseling be given *in person* by the physician or any other "qualified physician"; that the woman's gestational stage be provided to her orally and in writing; that the physician discuss with the woman a specific list of possible risks of abortion including infection, psychological trauma, hemorrhage, endometritis, perforated uterus, incomplete abortion, failed abortion, danger to subsequent pregnancies, and infertility, as well as "any other information that a reasonable patient would consider material and relevant to a decision of whether or not to carry a child to birth or to undergo an abortion"; that the physician inform the woman that fetal ultrasound imaging and auscultation of fetal heart beat

narrow exceptions of questionable utility that were not present in the Pennsylvania law.[354] Notably, the statute did not contain Pennsylvania's health exception permitting doctors to omit informed consent information that would "result in a severely adverse effect on the physical or mental health of the patient."[355]

The *Karlin* court undertook an extensive discussion of the *Casey* standard, including its purpose prong.[356] Starting with the observation that "[t]he Court's application of the test to the Pennsylvania statute at issue sheds some light on the meaning of the test,"[357] the district court noted that the *Casey* joint opinion "did not subject the Pennsylvania law to a searching purpose inquiry."[358] The *Karlin* court drew a lesson from this silence: "The absence of any detailed discussion of the purpose prong of the undue burden test in *Casey* signals the considerable difficulty of mounting a credible challenge to an abortion law on the premise that the law harbors an impermissible purpose, even if the law's provisions are medically unnecessary."[359]

The district court is somewhat critical of the Supreme Court's inadequate guidance on this point, and gamely attempts to fill in the blanks. Ultimately, however, the district court imputes the Supreme Court's silence to a tacit conclusion that the plaintiffs had failed to make their purpose case, noting that "[n]one of the Pennsylvania regulations was invalidated because of an invalid purpose."[360] The district court makes the further logical error of concluding that, because the Pennsylvania statute did not have an impermissible purpose, therefore the Wisconsin statute also did not: "Moreover, the Supreme Court

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services are available and how to obtain them; and that the woman be provided with the name and phone number of a physician to call following the procedure should she experience any complications. *See* WIS. STAT. § 253.10(3)(c)1 (2005). In addition, like the Pennsylvania statute on which it was modeled, the Wisconsin statute directed the publication of printed materials describing fetal development and listing agencies offering assistance to women continuing their pregnancies; unlike the Pennsylvania law, however, Wisconsin required that the provider "physically give" the woman these printed materials. *See id.* § 253.10(3)(c)2.d. To add insult to injury, the providers could be charged a fee for them. *See id.* §§ 253.10(3)(d), 46.245.

354. For example, the twenty-four-hour waiting period could be waived if the woman seeking abortion care alleged that she was the victim of sexual assault which she had reported to law enforcement authorities, and the provider had verified that the report had been made. *See id.* § 253.10(3m)(a). Applying a somewhat tougher rule for incest survivors, the waiting period could be reduced to two hours but not waived if a woman or child alleged that she had survived an act of incest and had reported it to law enforcement authorities, and her provider had verified that the report had been made. *See id.* § 253.10(3m)(b).

355. *See* 18 PA. CONS. STAT. ANN. § 3205(c) (West 2000).

356. *Karlin*, 975 F. Supp. 1177.

357. *Id.* at 1199-1200.

358. *Id.* at 1208.

359. *Id.*

360. *Id.* at 1204. As explained above, the *Casey* plaintiffs had had no opportunity to produce proof of legislative purpose, as such evidence would have been unnecessary, if not irrelevant, to the governing strict scrutiny standard in effect at the time. *See supra* note 114 and accompanying text.

reviewed similar provisions in the Pennsylvania law and did not find that they revealed an impermissible legislative purpose."[361]

> Were *Casey* not binding, I might be inclined to hold that AB 441 was passed with an impermissible purpose, given the absence of any apparent medical benefits in the new legislation, the acknowledgment of Dr. Gianopoulos that the previous law adequately informed women about the risks of abortion, the imposition of a two-trip requirement that will greatly increase the cost and difficulty of obtaining an abortion and make women far more vulnerable to harassment by anti-abortion protesters, and the evident effort of the legislature to impose requirements on physicians that will reduce the number of abortions they can perform, increase their risk of being sued or losing their licenses and add to the expenses of their practices. However, lower courts are bound by Supreme Court precedent. I do not see how *Casey* does not control this question.[362]

With the same uncritical reflex that characterizes many lower courts' effects analysis, the *Karlin* court dismissed the plaintiffs' evidence that anti-abortion groups were heavily involved in the development and passage of the abortion restrictions, transforming *Mazurek*'s particularized holding that the evidence in that case was insufficient to prove improper legislative purpose[363] into a hard-and-fast rule that "the involvement of anti-abortion groups in drafting legislation has no relevance to the legislature's purpose."[364]

On appeal, the Court of Appeals for the Seventh Circuit upheld the district court's purpose prong analysis,[365] noting that, "[a]bsent some evidence demonstrating that the stated purpose is pretextual, our inquiry into the legislative purpose is necessarily deferential and limited."[366] Like the district court, the appeals court read *Casey* and *Mazurek* to suggest that "such a challenge will rarely be successful, absent some sort of explicit indication from the state that it was acting in furtherance of an improper purpose."[367] Because *Casey* "accepted at face value" the state's proffered legislative purposes and did not "scrutinize too closely" the intent underlying the challenged Pennsylvania provisions,[368] the Seventh Circuit simply accepted Wisconsin's asserted purposes. In doing so, the appeals court dismissed the proof of

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361. *Id.* at 1212.

362. *Id.*

363. *See supra* Part III.A.

364. *Karlin*, 975 F. Supp. at 1211. This error was repeated in other cases. For example, in *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006), the Court of Appeals for the Sixth Circuit held that a licensing statute was facially neutral because it applied to all health care facilities, rejecting evidence of improper purpose in the lobbying campaign conducted by anti-abortion activists trying to deny the providers a license, despite a district court finding that the director had been actually affected by this political pressure. Reasoning that no improper purpose could be found where the department had granted licenses to other abortion providers, the appeals court upheld the statute.

365. Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999).

366. *Id.* at 496.

367. *Id.* at 493.

368. *Id.*

improper purpose adduced at trial,[369] including the trial court's finding of an "*evident effort of the legislature* to impose requirements on physicians that will reduce the number of abortions they can perform, increase their risk of being sued or losing their licenses and add to the expenses of their practices."[370] Ignoring the trial court's finding of the legislature's "evident effort" to impede abortion services, the appeals court chastised the plaintiffs for failing to "come forward with some evidence of unconstitutional intent or purpose especially when the legislature has otherwise identified permissible purposes in enacting the legislation being challenged."[371]

Similar analytical errors can be found in appeals courts' reversals of lower courts' application of the purpose prong. In *Greenville Women's Clinic v. Bryant*, discussed above,[372] the district court found an improper purpose based upon the rushed legislative process that provided "no meaningful inquiry" into appropriate regulations for an abortion clinic, leading to many unnecessary and burdensome requirements.[373] The finding of improper purpose was based in part on *Casey*'s admonition that improper purpose may be inferred where "a requirement[] serves no purpose other than to make abortions more difficult."[374] Here, the district court found no evidence that the onerous regulation was needed or that the restrictions advanced their asserted purpose.[375] Credible testimony had established that the state was not experiencing a public health crisis, and that there was no indication that abortion providers were dispensing unsanitary or inadequate care.[376] On appeal, however, the Court of Appeals for the Fourth Circuit reversed this ruling and upheld the statute, reasoning that "there is no requirement that a state refrain from regulating abortion facilities until a public-health problem manifests itself."[377]

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369. *Id.* at 496.

370. *Karlin*, 975 F. Supp. at 1211 (emphasis added).

371. *Karlin*, 188 F.3d at 496.

372. *Supra* notes 285-308 and accompanying text.

373. Greenville Women's Clinic v. Bryant, 66 F. Supp. 2d 691, 705-10 (D.S.C. 1999).

374. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).

375. *Greenville Women's Clinic*, 66 F. Supp. 2d at 711.

376. *Id.*; *see also id.* at 715 (finding testimony credible).

377. Greenville Women's Clinic v. Bryant, 222 F.3d 152, 169 (4th Cir. 2000). Similarly, in *A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434, 1463-66 (S.D. Ind. 1995), discussed *supra* notes 260-280 and accompanying text, the district court granted plaintiffs' motion for a preliminary injunction after examining the legislative history of the challenged statute, including records of the legislative debate. In light of that debate, the court expressed skepticism that the state's asserted purpose in enacting a requirement that informed consent counseling be provided in the presence of the pregnant woman—to deter telephonic impersonation of health care providers—was genuine. Even so, the court was unwilling to base its ruling on a purpose prong analysis, noting the difficulty in determining the subjective motives of state legislators and ruling instead on the basis of the statute's unduly burdensome effects. Following a ruling from the state courts answering certified questions regarding the "in the presence" requirement, A Woman's Choice-E. Side Women's Clinic v. Newman, 671 N.E.2d 104 (Ind. 1996), the Seventh Circuit reversed the grant of preliminary injunctive relief to the plaintiffs based on the effects prong, disregarding the district court's concerns about the apparently

Not every court, however, has given the purpose prong such short shrift. Other courts have read *Mazurek* and *Casey* to require an individualized assessment of the totality of circumstances revealing legislative purpose. In *Okpalobi v. Foster*,[378] a challenge to Act 825, a Louisiana statute broadly creating tort liability for medical professionals providing abortion care,[379] the district court expressed suspicion of the state's asserted purpose of ensuring that abortion providers obtain informed consent. The court questioned why the state would not simply strengthen the preexisting informed consent statute.[380] Determining that the statute's purpose and effect were to impose a substantial obstacle to abortion, the trial court granted the preliminary injunction.[381]

On appeal, a panel of the Fifth Circuit looked carefully at *Mazurek* and *Casey* and concluded that the Louisiana law was unconstitutional based in part on its improper purpose.[382] The court noted that, under *Casey* and Fifth Circuit precedent applying *Casey*, the purpose prong inquiry should not be conflated with the inquiry into the effects prong, but should be independently analyzed.[383] Looking closely at the discussion of legislative purpose evidence in *Jane L.*[384] and *Mazurek*,[385] the appeals court understood these cases to "reconfirm that the established methods for assaying a legislature's purpose are valid in the abortion context."[386] *Mazurek* merely rejected two types of evidence as insufficient proof that the legislature acted with a forbidden motive—medical data showing that nonphysicians could safely perform abortions and evidence that anti-abortion groups lobbied for the challenged statute.[387] Similarly, *Jane L.* relied not only on the state's admission of improper purpose, but also on the evidently improper purpose revealed on the face of the statute.[388] Declining to read either decision as support for the sweeping proposition that an improper purpose cannot be established absent a party's admission, or that the statutory language, legislative history and context, and related legislation are irrelevant, the appeals court turned to the task of determining what evidence of improper purpose to consider.[389]

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improper purpose of the statute. A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 693 (7th Cir. 2002).

378. 981 F. Supp. 977 (E.D. La. 1998), *aff'd*, 190 F.3d 337 (5th Cir. 1999), *rev'd on other grounds*, 244 F.3d 405 (5th Cir. 2001) (en banc).

379. LA. REV. STAT. ANN. § 9:2800.11 (redesignated as § 9:2800.12) (2006).

380. *Okpalobi*, 981 F. Supp. at 983.

381. *Id.* at 986-88.

382. *Okpalobi*, 190 F.3d at 357.

383. *Id.* at 354 ("As the . . . test for undue burden is disjunctive, a determination that either the purpose *or* the effect of the Act creates such an obstacle is fatal.") (discussing *Casey* and Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992)).

384. Jane L. v. Bangerter, 102 F.3d 1112 (10th Cir. 1996).

385. Mazurek v. Armstrong, 520 U.S. 968 (1997); *see supra* Part III.A.

386. *Okpalobi*, 190 F.3d at 356.

387. *Id.* at 355.

388. *Id.* at 356.

389. *Id* at 355-56.

Like other courts, the *Okpalobi* appeals court commented that *Casey* gave "little, if any" guidance on how to conduct a purpose prong inquiry.[390] However, the appeals court found ample guidance in constitutional case law from other contexts, specifically, voting rights and Establishment Clause cases.[391] In these cases, which included *Edwards v. Aguillard*,[392] *Stone v. Graham*,[393] and *Shaw v. Hunt*,[394] it was proper for courts to give significant deference to "a government's articulation of legislative purpose."[395] However, as *Edwards* and *Stone* emphasized, that purpose had to be more than a "mere 'sham.'"[396] Following this body of precedent, the court determined that "the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure" all constituted relevant evidence of legislative purpose.[397]

In applying this analytical method to Act 825, the court found evidence of improper purpose in the language of the challenged provision. The state's asserted purpose was to inform the woman's choice and to ensure that physicians shared information about the risks of abortion with their patients.[398] However, the "plain language" and the structure of the Act refuted these assertions, because the statute created a tort cause of action, and informed consent was only included in the statute as a way of reducing damages, not avoiding liability.[399] Reading the Act in conjunction with the state's informed consent law, the court concluded, "it is undeniable that the provision is designed not to supplement the Woman's Right to Know Act, but to ensure that a physician cannot insulate himself from liability by advising a woman of the risks . . . associated with abortion."[400] Acknowledging that the deference that courts owe to state legislation might have presented a close question had the statute's only constitutional infirmity been its improper purpose, the appeals court determined that the statute's effect would also have been to impose an undue burden, and accordingly enjoined the Act.[401] The ruling was short-lived, as the court of appeals sitting en banc subsequently vacated the judgment on

390. *Id.* at 354.
391. *See* Metzger, *supra* note 29, at 2072-77 (discussing the Establishment Clause endorsement test as a useful method for applying the undue burden standard).
392. 482 U.S. 578 (1987).
393. 449 U.S. 39 (1980).
394. 517 U.S. 899 (1996).
395. *Okpalobi*, 190 F.3d at 354.
396. *Id.* (quoting *Edwards*, 482 U.S. at 586-87, and citing *Stone*, 449 U.S. at 41).
397. *Id.*
398. *Id.* at 356.
399. *Id.*
400. *Id.* at 357.
401. *Id.*

other grounds.[402] Still, the *Okpalobi* appellate decision stands as a model for purpose prong analysis, and a clear example of the vitality that this test retains.

The opinion of the Court of Appeals for the Eighth Circuit in *Planned Parenthood of Greater Iowa v. Atchison*[403] provides a final example of the careful application of the purpose prong. In *Atchison*, the district court had closely scrutinized the motives of the Iowa Department of Health in applying its certificate-of-need law[404] to abortion providers but not to other outpatient medical providers.[405] The evidence in the record revealed that an anti-abortion lobbying campaign had targeted the clinic at issue in the case,[406] and that, "in the ten years preceding this case, no similarly structured outpatient clinic had been required to obtain a certificate of need before opening for business."[407] Unlike the *Karlin*[408] and *Baird*[409] courts, the Eighth Circuit did not conclude that evidence of anti-abortion lobbying groups' involvement in the formulation of a challenged policy can never have any probative value in evaluating impermissible intent. The appeals court clarified that, although the anti-abortion lobby's advocacy for a review of the proposed clinic did not constitute evidence of improper purpose, the state's response to that lobbying campaign did.[410] The court of appeals refused to disturb the district court's finding of improper purpose based on the Department's apparent motive—to prevent a particular provider from operating—and on the social and historical context of the applied restriction.[411] In enjoining the application of the certificate of need requirement to Planned Parenthood, the court of appeals quoted *Casey*'s admonition that, "where a requirement serves no purpose other than to make abortions more difficult, it strikes at the heart of a protected right, and is an unconstitutional burden on that right."[412]

Perhaps the *Okpalobi* and *Atchison* plaintiffs succeeded in establishing improper purpose in part because the provisions at issue—a tort liability statute

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402. Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (en banc) (holding that the Eleventh Amendment barred federal court jurisdiction over claims against defendants who lacked enforcement authority over challenged statute).

403. 126 F.3d 1042 (8th Cir. 1997).

404. Under section 135.63(1) of the Iowa Code, prior to offering any new institutional health service, a provider must obtain a "certificate of need" from the Department of Health following a public hearing process in which the clinic must prove that its services are needed, economical, and not merely duplicative of existing medical facilities' services. IOWA CODE § 135.63(1) (2005). In applying this provision to abortion providers, the Department of Health gave opponents of abortion a mechanism for blocking new clinics. *Atchison*, 126 F.3d at 1044.

405. *Atchison*, 126 F.3d at 1046.

406. *Id.* at 1044.

407. *Id.* at 1046.

408. Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999); *see supra* notes 350-371 and accompanying text.

409. Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595 (6th Cir. 2006); *see supra* notes 309-321 and accompanying text.

410. *Atchison*, 126 F.3d at 1049.

411. *Id.*

412. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).

and a certificate of need requirement—had no counterparts in the legislation challenged in *Casey*, thus facilitating a fresh look at the challenged provisions. Regardless of whether or not abortion restrictions mirror the Pennsylvania restrictions in *Casey*, however, the individualized assessment of the totality of circumstances revealing legislative purpose undertaken by the *Okpalobi* and *Atchison* appellate courts indicates that the purpose prong can indeed provide the basis of a viable undue burden challenge.

V. CONCLUSION

In the coming terms, the Roberts Court will undoubtedly have ample occasion to consider the scope of constitutional protection for abortion and to clarify the contours of the undue burden standard. The *Casey* Court retreated from *Roe*'s high level of protection. However, its broad articulation of the undue burden standard, the joint opinion's application of that standard to strike down Pennsylvania's spousal notification requirement, and its emphasis on women's equality promised meaningful protection for women's abortion rights. Some post-*Casey* lower court decisions demonstrate that, if fairly and correctly applied, the undue burden standard can provide a reasonable measure of protection for women's right to choose abortion. Other lower federal courts, however, have misconstrued and misapplied the undue burden standard, thereby seriously weakening it. As discussed in Part IV, the analytical errors committed in some of these cases have included: (1) imposing unattainable evidentiary burdens on plaintiffs; (2) reflexively sustaining the constitutionality of restrictions similar to those upheld in *Casey*, despite a different and stronger factual record of burdensome effect; (3) scrutinizing the effect of an abortion regulation in isolation from other restrictions that compound its burdensome impact; (4) evaluating the impact of restrictions from the point of view of the privileged, rather than contextualizing the burden within the realities of affected women's lives; (5) at the appellate level, discounting trial courts' factual findings in favor of the appeals court's own assumptions and inferences; and (6) requiring an admission by defendants of improper purpose, or requiring proof that not a single legislator acted with a permissible purpose, or excising the purpose prong from the undue burden test altogether. These decisions illustrate the clear danger that, if not corrected by the Court, the undue burden standard can be manipulated so as to substantially undermine *Roe*'s core protections, whether or not *Casey* is explicitly overruled.

If the undue burden standard is to remain in place and if it is to fulfill *Casey*'s promise that "the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but

not in fact,"[413] then the Court should provide the guidance for which this body of case law cries out. Pre-enforcement facial challenges to restrictive abortion laws must be permitted to proceed without being doomed from the outset by evidentiary hurdles that are virtually impossible to meet. In this regard, the Supreme Court must make explicit what is implicit in *Casey*, *Stenberg*, and *Ayotte*: Facial challengers need not meet *Salerno*'s tough evidentiary burden of showing that there exists "no set of circumstances" under which the law can validly be applied.[414] Rather, as *Casey* instructs, challengers must establish that, "in a large fraction of the cases in which [it] is relevant, [the law] will operate as a substantial obstacle to a woman's choice to undergo an abortion."[415] Furthermore, in applying *Casey*'s undue burden standard, the Court must clarify that the proper focus is whether a given restriction is *likely* to pose a substantial obstacle to those women for whom the restriction is relevant, and that litigants need not meet the heightened standard of perfection—requiring proof not "open to debate" of how the law is bound to affect women—imposed by the Seventh Circuit in *Newman*[416] and suggested by the Fourth Circuit in *Greenville*.[417]

Moreover, in assessing the evidentiary record to determine an abortion law's potential impact, lower courts have too often failed to conduct a contextualized, fact-sensitive analysis of its likely impact on women, resulting in shallow, even dismissive treatment of the realities of women's lives. Such cursory treatment is not how the *Casey* Court applied the undue burden standard to the husband-notification provision, the only provision with a truly well-developed factual record, and it is not how the *Stenberg* Court analyzed restrictions on abortion methods that had the potential to harm women. The Court must clarify that lower courts must conduct a full review of the evidentiary record to measure the impact of all abortion restrictions—including those similar to ones upheld in *Casey*—to determine whether they pose a substantial obstacle to women. This assessment must incorporate the perspective of the women and girls actually affected by these laws. If the undue burden standard is to provide meaningful protection, courts must acknowledge the current real life challenges of poverty, violence, youth, and geography that make access to abortion very difficult for some women, and give careful consideration to the ways in which an abortion restriction, operating with others, can exploit and exacerbate those difficulties to the point that access to abortion is effectively denied. These assessments must be grounded in the

413. *Id.* at 872.

414. United States v. Salerno, 481 U.S. 739, 745 (1987).

415. *Casey*, 505 U. S. at 895.

416. A Woman's Choice-E. Side Clinic v. Newman, 305 F.3d 684, 693 (7th Cir. 2002); *see supra* notes 260-280 and accompanying text.

417. Greenville Women's Clinic v. Bryant (*Greenville I*), 222 F.3d 157, 170 (4th Cir. 2000); *see supra* notes 285-308 and accompanying text.

evidentiary records before courts. As the decisions discussed in Part IV illustrate, when courts base conclusions on pure speculation disconnected from the record evidence of the realities of women's lives, they inevitably minimize and discount the impact of challenged restrictions, viewing them as mere inconveniences rather than the insurmountable obstacles they are for those women for whom the restriction is relevant.[418]

The Supreme Court must also dispel the confusion it created in *Mazurek* by clarifying the types of evidence that would support a determination of improper purpose. Specifically, the Court should confirm that "the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure" all constitute relevant evidence of legislative purpose.[419] In addition, the Court should reaffirm that, consistent with *Casey*, a finding that a legislature enacted an abortion restriction for the purpose of imposing a substantial obstacle in the path of a woman seeking abortion is, in and of itself, sufficient to render that restriction unconstitutional.

Our research reveals a troubling tendency of appellate courts to disregard the factual findings of district courts and to substitute their own presumptions in the absence of any finding of clear error. In doing so, these courts undermine the undue burden standard by divesting the trial courts of their authority, as triers of fact, to assess whether a challenged regulation will impose a substantial obstacle. The Supreme Court must admonish appellate courts to give appropriate deference to the factual findings and inferences of improper purpose or effect drawn by trial courts.

Finally, the Supreme Court's upcoming review of lower court decisions striking down the federal abortion procedure ban provides it with an opportunity to reaffirm its steadfast insistence—clarified and strengthened in post-*Casey* decisions over a decade and a half—that abortion restrictions must never damage women's health. To vindicate this principle, unquestionably at the core of the right recognized in *Roe*, the undue burden standard must be clarified and reinvigorated so that the promise of *Casey* is realized in meaningful protection for women.

418. *Casey*, 505 U.S. at 895.

419. Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999).